SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

v.

LINDA ALCALA, JANE DOE AND JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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S. Rep. No. 744, 90th Cong., 1st Sess. (1967) (1967 U.S. Code Cong. & Adm. News 3031) 32, 36

H.R. Rep. No. 544, 90th Cong., 1st Sess. (1967) 32

MISCELLANEOUS:

Ballantine's Law Dictionary (3rd ed. 1969) 19

Black's Law Dictionary (Rev. 4th ed. 1968) 19, 39

California Assembly Committee on Health and Welfare, *Malnutrition: One Key to the Poverty Cycle* (1970) 43

Comment, *Welfare's 'Condition X,'* 76 Yale L.J. 1222 (1967) 9

Funk & Wagnall's Standard Dictionary, Int'l Edition (1958) 19

Garry & Steven, *A Review of Recent Work On Dietary Requirements in Pregnancy and Lactation*, 5 Nut. Abstracts 855 (1935) 25

Iowa State Department of Social Services, *Annual Report* (1973) 44

Iowa State Dept. of Social Welfare, *Annual Report* (1946) 42

Murray, *New English Dictionary* (1893) 19

Note, *Statutory and Constitutional Bases for Extending AFDC Benefits for Families with Unborn Children*, 48 So. Calif. L. Rev. 121 (1974) 52, 55

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Oxford English Dictionary 19

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Third Annual Report of the Federal Security Agency: Social Security Board (1938) 32

Unborn and Underfed, Interim Report by the Chairman of the Subcommittee on Nutrition and Human Needs of the California Senate Committee on Health and Welfare (January, 1973) 26

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

1. Is the Petitioners' policy of excluding unborn children and their mothers from AFDC eligibility

inconsistent with the Social Security Act, in particular 42 U.S.C. §§ 602(a)(10) and 606(a), and hence in violation of the Supremacy Clause of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

In addition to the Constitutional provisions, statutes, and regulations listed in Petitioners' Brief (at 2-3), the following are set forth in pertinent part in the text of this Brief: 42 U.S.C. §§ 602(a)(10), 606(b), 1302, 1304, 1396d(a); § 401, Social Security Act of 1935, 49 Stat. 620; 45 C.F.R. § 233.90(c)(3).

Excerpts from the following additional provisions are set forth in Addendum L: Handbook of Public Assistance Administration, Part IV, §§ 3400, 3410-3412 (1946); Iowa State Department of Social Services Employees' Manual, Items XII-1-10a, XII-1-10b, XII-1-14.

SUMMARY OF ARGUMENT

This Court's decisions in *King v. Smith*, *Townsend v. Swank*, and *Carleson v. Remillard* make it clear that in the absence of congressional authorization to the contrary clearly evidenced in statutory language or legislative history, the states may not impose definitional eligibility conditions for AFDC assistance which exclude applicants who are eligible under federal

standards expressed in 42 U.S.C. § 606. Moreover, if applicants are eligible under the definitions of § 606, then H.E.W. regulations making eligibility optional with the states are invalid. This Court's decision in *N.Y. State Dept. of Social Services v. Dublino* did not qualify or limit the *King-Townsend-Remillard Trilogy*, since the holding in that case was grounded on a rejection of the plaintiffs' "pre-emption" argument, and did not involve any question of definitional eligibility under 42 U.S.C. § 606.

It is clear that there is no congressional authorization in either the Social Security Act or its legislative history for the exclusion of unborn children and their mothers from AFDC assistance. Thus, the central issue is whether pregnant women are eligible for AFDC assistance with respect to their unborn children under the definitional standards of the Social Security Act. This issue turns on the question of whether an unborn child is a "dependent child" within the meaning of 42 U.S.C. § 606(a).

The "plain" or "common" meaning of the terms of the Social Security Act does not provide a clear answer to this question of statutory interpretation. Thus, it is necessary to look at (1) the statutory purposes of the Social Security Act, and (2) interpretation of the term "dependent child" by the agencies charged with the administration of the AFDC program.

The "paramount purpose of AFDC" is the protection of dependent children so that they may develop into useful citizens. Given the strong relationship between pre-natal welfare and nutrition and the subsequent mental and physical development – or even the survival – of the child, the exclusion of unborn children and

their mothers from AFDC assistance is totally inconsistent with the paramount purpose of the Social Security Act to protect children and foster their development.

Moreover, failure to provide financial assistance during the pre-natal period would render futile and ineffective the pre-natal services and nutritional advice that are funded through Title V of the Social Security Act. Especially in light of the Social Security Act's interest in the welfare of children, the health and educational services provided under Title V must sensibly be seen as complementary to, rather than exclusive of, necessary financial assistance under Title IV.

Congress' understanding that unborn children and their mothers are eligible for AFDC also has been demonstrated in its passage of Title XIX of the Social Security Act. Unless unborn children are "dependent children" under 42 U.S.C. § 606, a woman who is pregnant with her first child will not be entitled to pre-natal care under Title XIX – although a pregnant woman who is on AFDC because she has previously given birth to another child clearly is entitled to complete pre-natal medical care under that Title. This absurd distinction could not have been intended, but can be avoided only by recognizing that an unborn child is a "dependent child" for AFDC purposes.

Perhaps most significantly, H.E.W. and its predecessor agencies have for over 30 years interpreted the term "dependent child" in 42 U.S.C. § 606 as including unborn children. This long-standing interpretation of the term "dependent child" is consistent with the

purposes of the Social Security Act, and therefore should be followed by this Court, especially since 42 U.S.C. § 602(a)(10), the provision that requires that AFDC assistance be granted to "all eligible individuals," was enacted after the Bureau of Public Assistance (H.E.W.'s predecessor) had published its interpretation of 42 U.S.C. § 606(a) including unborn children within that section's coverage.

However, H.E.W.'s regulations making AFDC assistance with respect to unborn children optional with the States clearly are invalid in light of *Townsend v. Swank* and *Carleson v. Remillard*. Moreover, the recent disavowal of the interpretation of "dependent child" as including unborn children, in an H.E.W. amicus brief in *Adams v. Huecker*, both ignores the clear history of H.E.W. regulations concerning AFDC payments with respect to unborn children and hinges upon a totally untenable position with regard to H.E.W.'s rule-making powers under 42 U.S.C. § 1302, and is not entitled to any weight in this proceeding.

Thus, both statutory purpose and long-standing administrative interpretation show that unborn children are "dependent children" within the meaning of 42 U.S.C. § 606(a). Under *King*, *Townsend*, and *Remillard*, AFDC assistance therefore must be granted by the States to pregnant women with respect to their unborn children. Hence, the judgment below should be *affirmed*.

ARGUMENT

I.

STATES PARTICIPATING IN THE AFDC PROGRAM MAY NOT EXCLUDE INDIVIDUALS ELIGIBLE UNDER FEDERAL STATUTORY STANDARDS IN THE ABSENCE OF CLEAR CONGRESSIONAL AUTHORIZATION FOR SUCH EXCLUSION, H.E.W. REGULATIONS TO THE CONTRARY NOTWITHSTANDING.

The issue in this case is whether States participating in the Federal Aid to Families with Dependent Children (hereinafter "AFDC") program[1] must grant AFDC eligibility to unborn children and their mothers. This issue turns primarily on whether an unborn child is a "dependent child" within the meaning of 42 U.S.C. § 606(a).[2] Thus far, of the six circuit courts of appeal to consider this issue, five have ruled that an unborn child is a "dependent child" for AFDC purposes; the same result has been reached by fourteen of the eighteen district courts which have ruled on the issue.[3]

[1] 42 U.S.C. §§ 601-644.

[2] Except when otherwise indicated in the text, Respondents will cite to the United States Code sections covering the Social Security Act. Those section numbers can be converted to the Social Security Act section numbers by subtracting 200; thus, 42 U.S.C. § 606(a) is Social Security Act § 406(a).

[3] A listing of both the circuit and district court decisions may be found in the Fifth Circuit decision in *Parks v. Harden*, ____ F.2d ____, Addendum A, *infra*, at a5-6, n. 4. To Respondents' knowledge, that listing is complete, except for the omission of the decision in *Wisdom v. Norton*, ____ F.2d ____, Petitioners' Brief at 19 (2d Cir. 1974), which held that an unborn child was not a "dependent child" for AFDC purposes.

A. This Case is Governed by this Court's Holdings in *King v. Smith*, *Townsend v. Swank*, and *Carleson v. Remillard*.

As most of the lower courts which have ruled on the issues presented in this case have recognized, much of the necessary legal framework is contained in three recent decisions of this court on similar questions of AFDC eligibility: *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971); and *Carleson v. Remillard*, 406 U.S. 598 (1972). *See also, Lewis v. Martin*, 397 U.S. 552 (1970). In *King v. Smith, supra*, Alabama had denied AFDC eligibility to a mother because she had been "cohabiting" with a man, who was not the father of any of her children and who had no legal relationship to the mother. Alabama considered the man a substitute "parent" and thus within 42 U.S.C. § 606(a)'s definition of "parent." Alabama argued that since the children had not been "deprived of parental support" under 42 U.S.C. § 606(a), the children and their mother were ineligible for AFDC. This Court held that the Alabama regulation was invalid because it conflicted with the AFDC provisions of the Social Security Act, both insofar as it was based on the state's asserted interest in discouraging illicit sexual behavior and illegitimacy, and insofar as it defined the term "father" to include a person who did not owe to the child a state-imposed legal duty of support. Under this Court's analysis in *King*, the Social Security Act determined the class of individuals to whom the states were required to grant assistance; State provisions that had the effect of narrowing that class, thus denying eligibility to some whom Congress intended to cover, were to that extent invalid because of the requirement

of 42 U.S.C. § 602(a)(10) that AFDC be provided to "all eligible individuals."

In determining that the word "parent" in 42 U.S.C. § 606(a) did not include a man who did not owe a state-imposed legal duty to support, this Court looked, not to the "plain" or "common" meaning of the word "parent," but rather to the legislative *purposes* of the AFDC program—of which the paramount purpose is the economic protection of children.[4] This reliance on statutory purpose, rather than "plain meaning," in interpreting the word "parent" became even more clear in *Lewis v. Martin*, 397 U.S. 552 (1970), in which this Court declared invalid California's "Man Assuming the Role of Spouse" rule, and approved H.E.W. regulations which prohibited the States from defining even a non-adoptive stepfather as a "parent"—*unless* he owed a legal obligation to support under a State law "of general applicability." 397 U.S. at 555-58.

In *Townsend v. Swank, supra*, an Illinois statute and regulation allowed AFDC payments to the child and mother if the child was attending high school or vocational school but denied benefits if the child was in a college or a university. Both the federal statute (42 U.S.C. § 606(a)(2)(B)) and H.E.W. regulations (45 C.F.R. § 233.90(c)(1)(vi)) implied that the states could vary eligibility from the federal standards. H.E.W. filed an amicus brief in *Townsend v. Swank* which essentially

[4] This Court emphasized that the statutory eligibility requirement of parental absence was founded on the theory that AFDC assistance would not be necessary for children living with a "breadwinner" parent who owed a duty to support those children (and who would be *able* to provide support because "the work relief program and . . . the revival of private industry would provide employment" for him). 392 U.S. at 327-328.

argued that 42 U.S.C. § 606 only defined the outer limits of federal financial participation and that the states therefore were free to use more restrictive eligibility standards than the federal standards. H.E.W. also argued that a restrictive state option governing AFDC eligibility should be presumed valid, with federal criteria governing only where explicit statutory authority or the "equitable treatment" or "Condition X" doctrine would so dictate.[5]

In striking down the challenged state regulation as inconsistent with the Social Security Act, this Court clearly rejected H.E.W.'s arguments on all points. Instead of presuming restrictive state standards to be valid, the Court put the burden of proof on the state to show that the exclusion was "clearly evidenced" either by the Social Security Act or by its legislative history.

> Thus *King v. Smith* established that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that *excludes persons eligible for assistance under federal AFDC standards* [emphasis added] violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that H.E.W. regulations seem to imply that states may to some extent vary

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[5] H.E.W.'s standard of "equitable treatment" or "Condition X" meant that "when a state exercises its statutory option to prescribe status eligibility criteria other than the ones outlined in the federal act, H.E.W. approves the plan only if the classification effecting such (additional) limitation is a rational one in the light of the purposes of public assistance programs." Comment, *Welfare's 'Condition X,'* 76 Yale L.J. 1222 (1967).

> eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to *all eligible* individuals.' [Emphasis in original.]

Townsend v. Swank, 404 U.S. at 286.

In *Carleson v. Remillard, supra*, California regulations had interpreted the phrase "continued absence" in 42 U.S.C. § 606(a)(1) to exclude from AFDC coverage the family of a serviceman who was absent because of his military service, on the ground that his absence was "temporary" and not "continued."[6] This Court held that eligibility for AFDC benefits had to be measured by federal standards, that the term "continued absence" as used in 42 U.S.C. § 606(a)(1) connoted that the parent could be absent for any reason, and thus that the California regulation violated the Social Security Act and was invalid under the Supremacy Clause. As in *King v. Smith*, this Court relied heavily on the purpose of Title IV to provide economic protection for children who were deprived of the support of a "breadwinner," and on H.E.W. regulations interpreting "continued absence" to include a military absence. 406 U.S. at 602-04. Citing *King v. Smith*, this Court again stated that eligibility for AFDC must be measured by federal standards—and that in the absence of congressional

[6] "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence of from the home, or physical or mental incapacity of a parent. . ." 42 U.S.C. § 606(a)(1).

authorization for the exclusion, *clearly evidenced from the Social Security Act or its legislative history*, a state eligibility standard that excluded persons otherwise eligible for assistance under federal AFDC standards violated the Social Security Act and was therefore invalid under the Supremacy Clause. 406 U.S. at 600. Finally, this Court rejected H.E.W.'s argument that since the term "continued absence" was unclear, that states should have the option to exclude children whose parents were absent for military reasons. 406 U.S. at 602.[7]

From *King*, *Townsend*, and *Remillard*,[8] the following related principles emerge:

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[7] As in *Townsend v. Swank*, *supra*, H.E.W. filed an amicus brief in *Carleson v. Remillard*, reiterating their view that 42 U.S.C. § 606 prescribed only the outer limits of federal matching funds and that the states were free to define "continued absence" more narrowly than H.E.W.'s definition. After this H.E.W. brief was filed in *Carleson v. Remillard*, the Court decided *Townsend v. Swank* and invalidated H.E.W.'s argument. H.E.W. then filed a second amicus brief in *Carleson v. Remillard* that sought to distinguish *Townsend v. Swank* on the basis that in the latter, the "eligible individuals" were clearly defined in the statute, while in the former, the statute itself mandated no definition of "continued absence" and thus the states should be free to apply more restrictive conditions, limited only by "Condition X." The H.E.W. brief also argued that if wide latitude were given general definitional terms in the Act, the "floodgates" would be opened and most state plans would be invalidated. Memorandum of the United States as *Amicus Curiae* in *Carleson v. Remillard*, Number 70-250 (O.T. 1971). This Court unanimously rejected these arguments, stating that "[w]e search the Act in vain . . . for any authority to make 'continued absence' into an accordianlike concept, applicable to some parents because of 'continued absence' but not to others." 406 U.S. at 602.

[8] *See also, Lewis v. Martin*, *supra*.

(1) In the absence of Congressional authorization, neither the states nor H.E.W. may impose more restrictive eligibility conditions on applicants for AFDC than those set out in the Social Security Act;

(2) In order for the state to exclude from coverage an applicant eligible under federal standards, the state must meet a heavy burden of showing legislative history or statutory language "clearly evidencing" Congressional intent to exclude the applicant: and

(3) H.E.W. regulations or legal positions purporting to make eligibility for certain groups of applicants optional with the states are of no effect in the absence of the clear evidence of Congressional intent referred to in (2), above.

As argued more fully *infra*, application of these principles shows that the Petitioners' policy of denying AFDC assistance with respect to unborn children is inconsistent with the Social Security Act.

B. This Court's decision in *N.Y. State Department of Social Services v. Dublino* did not Qualify the *King-Townsend-Remillard* Trilogy, and is Inapplicable to this Case.

In arguing that this case is not governed by the *King-Townsend-Remillard Trilogy*, the Petitioners rely heavily on (a) a single sentence of dictum, and (b) a footnote, both lifted out of context, from this Court's decision in *N.Y. State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973):[9]

[9]Petitioners' Brief at 6-7, 15-17.

(a) "In those cases [*King*, *Townsend*, and *Remillard*] it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible . . . ."

413 U.S. at 421 (emphasis added);

(b) " 'So long as the States' actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the Courts may not void them."

413 U.S. at 423, n. 19.

In quoting the above language from *Dublino*, Petitioners place heavy emphasis on the word "expressly." The basic idea advanced by the Petitioners seems to be that unborn children are not "expressly" included in AFDC coverage, whereas children with a substitute "parent" (*King v. Smith*, *supra*), a non-adoptive stepfather (*Lewis v. Martin*, *supra*), or a father who is absent for military service (*Carleson v. Remillard*, *supra*) are "expressly" included in such coverage. But even a cursory glance at *King*, *Lewis*, and *Remillard* demonstrates that that distinction simply is not supportable. What the district court and court of appeals held in this case was precisely that 42 U.S.C. § 606(a) "expressly provided" for the eligibility of the unborn child as a "dependent child." Certainly an unborn child is as "expressly" included in the term "dependent child" as a substitute father or non-adoptive step-father is excluded from the term "parent" *if and only if* he has no state-imposed duty to support, or as a military absence is included in the term "continued absence." Indeed, that the characterization of the *King-Townsend-Remillard Trilogy* quoted from

Dublino does not mean that the words of the Social Security Act themselves must specifically and unambiguously provide for inclusion of unborn children is demonstrated by the fact that in *King*, *Lewis*, and *Remillard*, *supra*, this Court turned primarily to H.E.W. interpretations and the statutory purposes of Title IV – and not to the specific language of 42 U.S.C. § 606(a) – in deciding the eligibility questions presented in those cases. As argued *infra*, this case also requires an inquiry into H.E.W. interpretation and statutory purpose – both of which show that an unborn child is a "dependent child" for purposes of 42 U.S.C. § 606.

Both the context and holding of *Dublino* show that it does not "qualify" the *King-Townsend-Remillard Trilogy* and that it is in fact totally inapposite to this case. Unlike this case and the *Trilogy*, *Dublino* did not deal with state exclusions of applicants from AFDC assistance that conflicted with the definitions of eligibility contained in 42 U.S.C. § 606(a). Rather, the issue in *Dublino* was simply whether "that part of the Social Security Act known as the Federal Work Incentive Program (WIN)" completely "pre-empted" the use of state work programs in the administration of the AFDC program. 413 U.S. at 407. This Court held that in light of the statutory scheme and the purposes of the Social Security Act, the WIN program was not designed "to be all embracing," and therefore held that the WIN program did not completely preempt all use of state work programs. *But* this Court remanded the case to the lower court to determine whether any particular features of the state rules challenged therein conflicted with the Social Security Act. Significantly, this Court pointed to *Townsend v. Swank*, *supra*, as the polestar in

determining whether any such conflicts existed. 413 U.S. at 421.23.

Moreover, in citing not only *Dublino*, but also such other cases as *Wyman v. James*, 400 U.S. 309 (1971), and *Jefferson v. Hackney*, 406 U.S. 535 (1972), for the proposition that the States have "considerable latitude in allocating their AFDC resources,"[10] the Petitioners neglect the fact that this case does *not* involve any question as to the States' undoubted discretion in establishing standards of need and amount of assistance or in promulgating "supplementary regulations ... within the legitimate sphere of state administration," *N.Y. State Dept. of Social Services v. Dublino, supra*, 413 U.S. at 422. The Social Security Act for the most part leaves to the states the administration of their programs – including the specific mechanisms for determining and confirming which applicants in fact fall within the categories defined in 42 U.S.C. § 606 – and the determination of financial need standards. Thus, the Social Security Act nowhere dictates the level of income which constitutes "need" or the level of benefits which must be paid to recipients. *Jefferson v. Hackney, supra; Dandridge v. Williams*, 397 U.S. 471 (1970). Nor does the Act, or the Constitution, preclude reasonable administrative procedures designed to assure that those in whose behalf AFDC assistance is being paid are in fact needy and/or actually receiving the benefit of that assistance. *Wyman v. James, supra.*[11]

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[10]Petitioners' Brief at 7.

[11]In *James*, the central issue was whether AFDC recipients could be required to submit to "home visits" by caseworkers; the plaintiffs argued that such mandatory visits violated the Fourth Amendment. This Court rejected the plaintiffs' argument, holding

In neither *James*, nor *Jefferson*, nor *Dublino* was there any issue as to whether the plaintiffs fit within the categories of eligible individuals defined in 42 U.S.C. §606. In *King*, *Townsend*, and *Remillard*, however, the central issue consistently was whether the plaintiffs were included in the mandatory statutory definitions of § 606. There is of course no question that this case involves purely a question of categorical definition under 42 U.S.C. § 606, and hence the *Remillard* line of cases, rather than *Dublino*, should be applied. As shown in the succeeding sections of this brief, statutory purpose and federal administrative regulations both affirmatively indicate that unborn children are to be *included* in the term "dependent child"; at the same time, there is no expression, clear or otherwise, of Congressional intent to exclude unborn children from the coverage of the AFDC program. Therefore, under *King*, *Townsend*, and *Remillard*, unborn children and their mothers *must* be made eligible for AFDC assistance.

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that the home visits, though not specifically provided for in the Social Security Act, were reasonable administrative means of (1) ensuring that the children for whom assistance was being paid were actually physically present in the home, 400 U.S. at 322; (2) checking on impending medical needs, *id.*; (3) assuring the state "that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses," 400 U.S. at 319; and (4) informing the public of how its "charitable funds are utilized and put to work," *Id.*

II.

AN UNBORN CHILD IS A "DEPENDENT CHILD" WITHIN THE MEANING OF TITLE IV OF THE SOCIAL SECURITY ACT.

The crucial statutory provision in this case is 42 U.S.C. § 606. Section 606(b) provides, in pertinent part, that:

> The term "aid to families with dependent children" means money payments with respect to, . . . or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living . . . .

The term "dependent child" is defined in 42 U.S.C. § 606(a) (in pertinent part) as:

> a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather . . . ., or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen . . . .

Of course, Section 606 does not specifically use the term "unborn child," and therefore does not explicitly include or exclude unborn children. Thus, the central question is whether the term "dependent child" in 42 U.S.C. §§ 606(a)-(b) includes unborn children. The succeeding portions of this brief will show, on the basis

of "common meaning," statutory purpose, and administrative interpretation, that an unborn child is a "dependent child" for AFDC purposes.

A. The "Common Meaning" of the Words "Dependent Child" is not Sufficiently Clear to Dispose of this Case.

Although, as shown below, the "plain" or "common" meaning of the words "dependent child" does not clearly dispose of this case, it does provide a useful starting point. As an initial matter, the proposition that an unborn child is a "child" gains support from the very fact that an unborn child is *called* an "unborn child"; and it is difficult to imagine a child that is any more "dependent" than one that is as yet unborn. In *Wisdom v. Norton*, ____ F.2d ____ (2d Cir. 1974),[12] the court found significant the fact that when one wishes to refer to an unborn child, one used the modifier "unborn"; from this, that Court inferred that an unborn child probably was not a "child." Petitioners' Brief at 25. But this position can only be characterized as totally illogical: The fact that one uses modifiers to specify particular kinds of children does not mean that such children therefore are not children. Thus, for example, if one wants to identify a black child as such, one uses the modifier "black"; but that certainly does not imply that black children are not "children."

Although none of the lower courts that have ruled on the issues presented in this case has relied ultimately on

[12]Opinion attached to Petitioner's Brief as Addendum A.

dictionary definitions of the word "child," most of them have made reference to those definitions. *Webster's New Twentieth Century Dictionary* (Unabridged (2d ed. 1970)), *Webster's Unabridged Dictionary* (2d ed. 1969), and *Webster's New Third International Dictionary* (1969) define "child" as: "An unborn or recently born human being, fetus, infant . . . ." *Black's Law Dictionary* (Rev. 4th ed. 1968), although not including the unborn child in its definition of "child," notes under the definition of the word "living" that "[a] child in the mother's womb is living." *See, also, Oxford English Di tionary.*[13] *But see, Funk & Wagnall's Standard Dictionary, International Edition* (1958); *The Random House Dictionary of the English Language* (Unabridged) (1966); *Ballantine's Law Dictionary* (3d ed. 1969).

A few courts also have mentioned colloquialisms which use the word "child" in a sense which precludes the unborn child. Thus, the Court in *Wisdom v. Norton, supra*, referred to the saying, "I have two children and one on the way" as support for its conclusion that the "ordinary meaning" of words "would seem to bear against the appellees' position."[14] Actually, this saying is rather ambiguous on the question of the meaning of "child," since it would appear to mean "I have two children and one [child] on the way [to birth]." In any event, as the *Wisdom* Court itself seemed to recognize,[15] such colloquialisms are really no more

[13]It is interesting to note that the word "child" is derived from the gothic "kilpec" and "inkilpo" — which meant "womb" and "pregnant woman," respectively. J.A.H. Murray, *New English Dictionary* (Oxford 1893).

[14]Petitioners' Brief at 25.

[15]Petitioners' Brief at 25.

useful in determining the meaning of the words "dependent child" as used within the framework of the Social Security Act than are dictionary definitions. Certainly one can think of other colloquialisms (e.g., a pregnant woman as one who is "carrying a child" or "with child") which use the word "child" in the sense of the unborn child.[16]

As most of the courts that have ruled on the "unborn child-AFDC" issue have recognized, the upshot of any objective inquiry into dictionary definitions, or into the "common," "plain," or "ordinary" meaning of the words "dependent child," is simply that such an inquiry does not provide any clear answers in this case.[17] *See, e.g., Parks v. Harden*, ____ F.2d ____, Addendum A, *infra*, at (5th Cir. 1974); *Alcala v. Burns*, 494 F.2d 743, 746 (8th Cir. 1974); *Wilson v. Weaver*, 499 F.2d 155, 157 (7th Cir. 1974); *Alcala v. Burns*, 362 F.Supp. 180, 184 (S.D. Ia. 1973); *Carver v. Hooker*, 369 F.Supp. 204, 212 (D.N.H. 1973). However, that inquiry does clearly establish at least that as a starting point, the words "dependent child" may

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[16]"Sir, she came in great with child; and longing, saving your honor's reverence, for stewed prunes." Shakespeare, *Measure for Measure* (Act II, Scene I).

[17]In *Mixon v. Keller*, 372 F.Supp. 51, 54 (M.D. Fla. 1974), the court cited the testimony of a medical expert that "fetuses are never referred to medically or clinically as children . . . ." However, technical medical terminology is hardly helpful to the inquiry involved in this case.

reasonably be interpreted so as to include the unborn "child."[18] *Alcala v. Burns, supra* at 746.

B. The Statutory Purposes of the Social Security Act Show that an Unborn Child is a "Dependent Child" within the Meaning of 42 U.S.C. §606.

Since the term "dependent child" does not by itself provide any clear answers in this case, most of the lower courts have turned to an inquiry into legislative "intent" or "purpose," and have concluded from that inquiry that an unborn child is a "dependent child" within the meaning of 42 U.S.C. § 606(a).[19] Such an inquiry is of course not uncommon in cases turning on statutory interpretation, particularly with regard to the

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[18]In *Parks v. Harden,* 354 F.Supp. 620, 623 (N.D. Ga. 1973), the court concluded, without analysis, that "there simply is no way to conclude that the word 'child' includes something else which is not a 'child' namely, an unborn child." Interestingly, the *Parks* Court itself referred to an "unborn child." More significantly, that Court's above-quoted conclusion is belied by the fact that the vast majority of the courts which have ruled on this issue *have* concluded that an unborn child is a "child" – including the Fifth Circuit Court of Appeals, which reversed the district court's decision in *Parks. Parks v. Harden, supra* (Addendum A, *infra*).

[19]*See, e.g., Wilson v. Weaver,* 499 F.2d 155, 157-58 (7th Cir. 1974); *Alcala v. Burns,* 494 F.2d 743, 746 (8th Cir. 1974); *Whitfield v. Minter,* 368 F.Supp. 798, 802-803 (D. Mass. 1973); *Stuart v. Canary,* 367 F.Supp. 1343, 1345-47 (N.D. Ohio 1973); *Green v. Stanton,* 364 F.Supp. 123, 126 (N.D. Ind. 1973); *Alcala v. Burns,* 362 F.Supp. 180, 184 (S.D. Iowa 1973).

Social Security Act.[20] Thus, as noted above, in *King v. Smith, Lewis v. Martin,* and *Carleson v. Remillard, supra*, this Court relied heavily on the purposes of the Social Security Act, rather than the "plain meaning" of the words involved therein, to resolve the statutory interpretation questions that lay at the heart of those cases. Certainly it could not clearly be said in *Remillard* that the absence of a father due to military service was a "continued absence" merely on the basis of the words themselves; but that conclusion followed easily from Title IV's purpose to provide support for those children who were deprived of support from the "breadwinner" parent. 406 U.S. at 602-604. Nor would the "plain meaning" of the word "parent" distinguish between a non-adoptive stepfather *with* a state-imposed legal duty to support and a non-adoptive stepfather *without* such a duty; but this Court's inquiry into statutory purpose in *King v. Smith* and *Lewis v. Martin, supra*, resulted in the conclusion that for purposes of 42 U.S.C. § 606(a), the word "parent" included the former, but not the latter.

As in *Rosado, King, Lewis,* and *Carleson*, inquiry into the purposes of the Social Security Act is both appropriate and necessary in this case.[21] Moreover, since the provisions of the Social Security Act are remedial in nature, they are entitled to broad, generous interpretation. To treat the Act otherwise would be to "abuse

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[20] "Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Rosado v. Wyman,* 397 U.S. 397, 412 (1970).

[21] *See also, Shea v. Vialpando,* ____ U.S. ____, 94 S.Ct. 1746 (1974).

the interpretative process and to frustrate the announced will of the people." *A. H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).[22] As shown below, the inclusion of unborn children in the term "dependent child" within the meaning of 42 U.S.C. § 606(a) is fully consistent with the purposes of the Social Security Act; and, equally importantly, to exclude unborn children would be *inconsistent* with those purposes.

1. Exclusion of unborn children and their mothers from AFDC eligibility is inconsistent with the purposes of Title IV of the Social Security Act.

As this Court has explicitly recognized, "the paramount goal of AFDC" is the protection of dependent children. *King v. Smith, supra*, at 325. This is clearly reflected in the original version of Section 401 of the Act, which provided that the purpose of Title IV was to enable "each State to furnish financial assistance, as far as practicable under the conditions in each State, to needy dependent children. . . ." 49 Stat. 620 (1935). In 1956, that statement of purpose was amended to "emphasize that services to strengthen family life are *included* in the program's objectives"; the strengthening of family life was seen as "an

[22] "It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are time when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." *Van Beek v. Sabine Towing Co.*, 300 U.S. 342, 350-51 (1937).

investment in future citizens."[23] Title IV thus is designed to protect needy dependent children from the often irreversible physical and mental harm that may result from economic deprivation, and to enable them to develop into independent, productive citizens.[24]

In light of the overriding purpose of Title IV to protect children from economic deprivation and thus foster their development, it simply would not make sense to exclude from AFDC eligibility needy unborn children whose economic interests were not protected by the presence in the home of a "breadwinner" parent. As shown by the uncontradicted district court testimony of Dr. Roy Pitkin, adequacy of nutrition during pregnancy has a direct and substantial relationship to the health and development of the child, both before and after birth. Single Appendix, pp. 13-16. It is clear that a mother's poverty and inadequate nutrition during pregnancy pose grave dangers to the child – dangers which may have serious and irreversible consequences following birth. For example, poverty and malnutrition during the pre-natal period are linked with a significantly increased likelihood not only of such relatively "benign" ailments as poor bone development, but also

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[23]S. Rep. No. 2133, 84th Cong., 1st Sess., June 5, 1956; reported in 1956 U.S. Code Cong. & Adm. News 3877, 3906 (emphasis added). *See*, 42 U.S.C. § 601.

[24]Title IV was restricted to children "deprived of parental support" only because it was understood that other children would be protected by the presence in the home of a "breadwinner" parent. *King v. Smith, supra* at 327-29.

of mental retardation, and even non-survival at birth.[25] Recognition of these relationships, although refined in recent years, is not new; they were clearly recognized in 1935, the year in which the Social Security Act was passed.[26] Indeed, Congress gave specific recognition to the relationships between pre-natal maternal welfare and the protection and development of children in passing Title V of the Social Security Act.[27]

From the above analysis, it is clear that in terms of their development – or even survival – dependent children are critically "needy" during the pre-natal

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[25]In part, this is because inadequate nutrition during pregnancy is a major determinant of low birth weight – which in turn is a major determinant of neo-natal survival, stillbirths, and subsequent physical and mental development. See Testimony of Dr. Pitkin, Single Appendix at 14-15; Supplemental Memorandum, Addendum B, *infra; Stuart v. Canary*, 367 F.Supp. 1343, 1346-47 (N.D. Ohio 1973).

[26]*See*, Garry & Steven, *A Review of Recent Work on Dietary Requirements in Pregnancy and Lactation*, 5 Nutrition Abstracts 855 (1935).

[27]Report of the Committee on Ways and Means, H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935). However, Title V cannot be looked at as the sole source of assistance for unborn children provided by Congress, since Title V provides only basic health services, such as nutritional *advice*. As argued more fully *infra*, to view Title V as the exclusive source of pre-natal protection would be to assume that Congress specifically intended to provide only partial, ineffective protection during that crucial period. Title V is more logically viewed as complementary to Title IV, with regard to both born and unborn children.

period.[28] Given the ultimate concerns of Title IV with the protection of children and their development into useful citizens, it would be incongruous to ignore the needs of children during the crucial pre-natal period, since without adequate assistance for the mother and child during that period, post-natal assistance would frequently be too little, too late.[29] In short, to interpret the words "dependent child" in 42 U.S.C. § 606(a) not to include unborn children is to assume that Congress was concerned with the development of children only insofar as they and their mothers survived the pre-natal and birth stages without irreparable mental or physical damage – hardly a likely assumption in light of the broad remedial purposes of the Social Security Act.[30]

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[28]Moreover, "a woman may be in need of more assistance during her pregnancy than after the birth of her child. While she is pregnant a woman may be prevented due to her physical condition from maintaining any form of employment. After birth the status of her health does not handicap her ability to obtain a meaningful source of income." *Wilson v. Weaver*, 499 F.2d 155, 158 (n. 4) (7th Cir. 1974).

[29]Moreover, additional post-natal care to attempt to ameliorate the harmful effects of pre-natal poverty (such as low birth weight or mental retardation, etc.) may be more expensive than the adequate pre-natal assistance that would have prevented those effects – even though such remedial care may not be able to repair the damage done by pre-natal neglect. *See, Unborn and Underfed*, Interim Report by the Chairman of the Subcommittee on Nutrition and Human Needs of the California Senate Committee on Health and Welfare (January 1973), Addendum C, *infra* at c4-c5.

[30]As stated in *Carleson v. Remillard*, *supra* at 604: "We cannot assume here, anymore than we did in King v. Smith, . . . that while Congress 'intended to provide programs for

The only court of appeals to hold that an unborn child is not a "dependent child" within the meaning of 42 U.S.C. § 606(a) relied to a considerable extent on its characterization of the statutory purpose of Title IV as being essentially and exclusively to "encourage the care of dependent children in their own homes or in the homes of relatives. . . ." *Wisdom v. Norton*, *supra*, Petitioners' Brief at 27 (2d Cir. 1974). On the basis of this characterization, the *Wisdom* opinion argued that "this concern that the mother be in the home to raise the child only comes into play once the child is born." *Id.* However, there are at least two serious problems with this view: (1) its basic premise, that the essential, exclusive statutory purpose of AFDC is to encourage women to stay home with their children, is clearly incorrect; and (2) even if that were the exclusive purpose of Title IV, failing to provide AFDC assistance to pregnant women on behalf of their unborn children would be inconsistent therewith.

The *Wisdom v. Norton* characterization of the purposes of Title IV does have some support in the present statement of purpose in 42 U.S.C. § 601, which includes the purpose of "encouraging the care of dependent children in their own homes or in the homes of relatives. . . ." However, the *Wisdom* opinion ignores several clear indications that the above-quoted portion

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the economic security and protection of *all* children,' it also 'intended arbitrarily to leave one class of destitute children entirely without meaningful protection.' " As noted *infra*, Title V of the Social Security Act does provide *some* protection for unborn children through health *services*; but those services would not be meaningful or effective without the financial assistance necessary to protect the mother and child during pregnancy.

of § 601 does not state the exclusive or overriding concern of Title IV.

First, the *Wisdom* characterization ignores the fact that the purpose originally stated in Section 401 of the Social Security Act was simply to enable each State "to furnish financial assistance . . . to needy dependent children. . . ." 49 Stat. 620 (1935). The language in that section concerning the care of children in the home was added in 1956 simply to "make explicit" a "major," but not exclusive objective of Title IV that previously had not been given sufficient attention. Nothing in the accompanying Senate Report or in the 1956 Amendments themselves indicated that those amendments were designed to change the basic thrust of the AFDC program to "furnish financial assistance . . . to needy dependent children. . . ."[31]

Second, Congress has made it abundantly clear since 1935 that the care of children in the home is not the exclusive—or even the major—thrust of the AFDC program. Rather, it is simply one of the preferences expressed in the ACT—but not to the detriment of the paramount goal of protecting children. Thus, for example, Congress has provided AFDC assistance to children placed in foster homes or in child-care institutions.[32] Moreover, AFDC payments also may be made on behalf of "children" between the ages of eighteen and twenty-one who are attending college or other educational institutions[33] —hardly a group with

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[31]S. Rep. No. 2133, 84th Cong., 1st Sess.; June 5, 1956; reported in 1956 U.S. Code Cong. & Adm. News 3877, 3905-3906.

[32]42 U.S.C. § 608; *see, King v. Smith, supra,* 392 U.S. at 324.

[33]42 U.S.C. § 606(a)(2); *Townsend v. Swank, supra.*

regard to which there can be any substantial interest in encouraging care in the home. Perhaps most significantly, both the WIN program, 42 U.S.C. § 602(a) (19), and state work programs–which this Court, in *N.Y. State Dept. of Social Services v. Dublino, supra*, recognized and held were not preempted by the WIN program–clearly cut against the purpose of encouraging parents to stay at home with their children to the exclusion of all other purposes.[34]

Third, the latter portions of the present version of 42 U.S.C. § 601 express a purpose to "help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . ." Given the serious and irreversible consequences that can result from pre-natal poverty and malnutrition, failure to provide protection during the pre-natal period may have a significant impact on the capability for self-support and "continuing parental care and protection."[35]

Finally, the *Wisdom* court's narrow characterization of the purposes of Title IV would imply that Congress' concern about encouraging care in the home was so strong that it precluded other considerations crucial to the development and protection of children–such as

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[34]Under 42 U.S.C. § 602(a)(19), most persons eligible for AFDC assistance are *required* to register for the WIN program. Mothers whose children are under the age of six are not *required* to do so, 42 U.S.C. § 602(a)(19)(A)(v), but may do so if they so desire, 42 U.S.C. § 602(a)(19)(A).

[35]*See, Alcala v. Burns*, 362 F.Supp. 180, 184 (S.D. Ia. 1973); *Parks v. Harden*, ____ F.2d ____, Addendum A, *infra*, at a22.

providing protection during the pre-natal period to avoid physical and mental damage to the child that could not be overcome after birth. That implication is both illogical and inconsistent with the Congressional expressions to the contrary noted above.

Of course, even if encouraging the care of children in the home by a parent or other relative were the overriding and ultimate purpose of Title IV, it is clear that the provisions of AFDC assistance to pregnant women on behalf of their unborn children would promote that purpose. First, insofar as a mother must work to support herself and her unborn child during pregnancy, the child is not being cared for in the more protected conditions of his or her home.[36] Second, and even more significantly, poor nutrition, inadequate health care, and poverty all are linked with increased risks of serious post-natal health problems and/or mental retardation of the sort that may strain the family relationship or require institutionalization of the child after birth. Finally, since poverty and accompanying poor nutrition and health care also increase the risk of maternal mortality,[37] lack of financial assistance during the pre-natal period further increases the chances that the surviving child will be raised, not by his or her mother in the home, but in an institution.

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[36]Moreover, if the mother must become indebted during the usually substantial portion of the pre-natal period during which she cannot work (or find work), she is more likely to be forced to work immediately after the birth of the child – and thus not care for the child in her home – in order to meet those debts.

[37]See Addendum B, at b4; Report of the Committee on Ways and Means, H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935).

In sum, although encouraging the care of children in the home is *one* of the subordinate purposes of Title IV, it is not its sole purpose, and does not override or conflict with the paramount goal of protecting dependent children.[38] And in any event, even the narrow purpose of encouraging the care of children in the home is clearly furthered by the provision of AFDC assistance during the pre-natal period. Thus, the statutory purposes of Title IV, however characterized, clearly support the conclusion that unborn "children" *are* "children" within the meaning of 42 U.S.C. § 606. And this conclusion becomes even more clear when one considers Title IV, not in isolation from the other provisions of the Social Security Act, but in light of other Titles as well, most significantly Title V and Title XIX.

2. Title V of the Social Security Act demonstrates Congressional concern with pre-natal protection and provides pre-natal health services that are complementary to AFDC assistance for the unborn.

Contemporaneously with Title IV, Congress also enacted Title V of the Social Security Act of 1935.[39] Title V was designed to provide "maternal and child welfare" services through state-administered programs.

> In Title V is it proposed that aid be given the States for other services very essential to the security of children. The first of these is aid for maternity and infancy welfare. . . . The need for

[38] *See, Wilson v. Weaver, supra,* 501 F.2d at 1247, n. 11.

[39] 42 U.S.C. §§ 701-716.

> such services has increased with the depression, and the fact that the maternal mortality rate in this country is much higher than in nearly all other progressive countries is certainly not to our credit.[40]

By 1938, federally approved plans for maternal and child welfare services under Title V were in operation in every state in the union.[41]

States have used federal funds under Title V for such services as pre-natal and postpartum clinics, public health nurse visitation programs, and "well-child clinics" for infants.

> The maternity and infant care projects promote public understanding of the importance of prenatal care in low-income neighborhoods, employ case finding methods . . . to find patients early in pregnancy, establish neighborhood clinics affiliated with hospitals, provide prenatal care, *nutritional advice*, homemaker services, public health nursing, and social services; and pay for hospital care for mothers and infants in hospitals staffed to give the quality of services high risk patients need.[42]

Thus, Congress clearly has recognized throughout the history of the Social Security Act that the health and well-being of the unborn child and its mother during the prenatal period are "essential to the security of

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[40]H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935).

[41]Third Annual Report of the Federal Security Agency: Social Security Board 125-26 (1938).

[42]Sen. Rep. No. 744, 90th Cong., 1st Sess. (1967), reported in 1967 U.S. Code Cong. and Adm. News at 3031-34. *See also*, H.R. Rep. No. 544, 90th Cong., 1st Sess. (1967). (Emphasis added).

children." Moreover, nutritional advice has been among the services provided under Title V.

Significantly, Title V provides funds only for *services*, such as health care and nutritional advice, and not for financial assistance on behalf of individual mothers. 42 U.S.C. §§701, 703. Thus, "Titles IV and V are qualitatively different weapons against poverty and deprivation, the latter providing medical services while the former disburses cash for the improvement of the home environment." *Carver v. Hooker*, 501 F.2d 1244, 1246 (1st Cir. 1974). Consequently, "the congressional concern evidenced by Title V with respect to prenatal care does not militate against an intention to assist the unborn through AFDC payments as well." *Id.*

Indeed, Congress' recognition that pre-natal welfare was "essential to the security of children," coupled with the provision of health services in Title V, *supports* a statutory purpose to provide financial assistance during the pre-natal period through Title IV. It would not make sense to provide funds for pre-natal health services and nutritional advice, but provide no funds for the pre-natal economic assistance that would enable the mother to follow that advice and thus protect her child's nutritional health. Without the prenatal financial assistance necessary to provide shelter and adequate nutrition for the welfare and development of the child (both before and after birth), Title V health services would often be useless or ineffectual.[43]

[43]This symbiotic relationship between economic protection and health services clearly is given recognition in Congress' extension of both Title IV and Title V funds for born children. As noted in *Carver v. Hooker, supra*, 501 F.2d at 1246, "because the medical services provided under Title V extend to born as well as unborn children, it seems incongruous that Congress would not make similar provision under Title IV."

Thus, Title IV and Title V are most sensibly viewed as complimentary programs that provide economic protection *and* health services for both born and unborn children.

3. The eligibility provisions of Title XIX (Medical Assistance) indicate that unborn children are covered by Title IV.

Further statutory evidence of a Congressional purpose to include unborn children in the term "dependent child" for AFDC purposes is found in the provisions of Title XIX of the Social Security Act.[44] Title XIX provides that "medical assistance" must be made available to all persons receiving categorical AFDC assistance under Title IV, subpart A of the Social Security Act. 42 U.S.C. § 1396a(a)(10)(A). For persons in this category, medical assistance must include, *inter alia*: (1) "inpatient hospital services"; (2) "outpatient hospital services"; (3) "other laboratory and X-ray services"; and (4) "physicians' services . . . whether furnished in the office, the patient's home, a hospital, a skilled nursing facility, or elsewhere. . . ."[45] Under federal and state definitions, these services include complete pre-natal health care for any individual who is receiving AFDC assistance.[46] Thus, a

[44] 42 U.S.C. §§ 1396-1396i.

[45] 42 U.S.C. §§ 1396(a)(1), (2), (3), (5); see § 1396a(a)(13)(A).

[46] 42 U.S.C. §§ 1396a, 1396d(a); 45 C.F.R. § 249.10(b)(5); Iowa State Department of Social Services Employees' Manual, p. XII-1-14.

pregnant woman in Iowa who is receiving AFDC assistance, by virtue of (1) being sufficiently needy and (2) already having one born child, receives complete pre-natal health care under Title XIX.

On the other hand, an equally needy woman who is pregnant for the first time, and who therefore is not eligible for AFDC assistance under the Iowa standards challenged in this action, is *not* entitled to such pre-natal assistance under Title XIX.[47] Of course, if anything, the woman who is pregnant with her first child is more likely to be in need of pre-natal care than one who has previously borne children; yet it is the latter, and not the former, who is given complete pre-natal care under Title XIX in any state which makes pregnant women ineligible for AFDC on behalf of their unborn children.

This anomaly clearly presents serious Equal Protection problems. Moreover, it is hard to imagine that the Congress which passed Title XIX intended such an irrational distinction. But given the language and structure of Title XIX, the only way in which the anomaly can be avoided is by interpreting the term "dependent child" in 42 U.S.C. § 606(a), consistently with the purposes of Title IV and the Social Security Act, so as to include unborn children and their mothers in AFDC coverage. Given the clarity with which entitlement to Title XIX medical assistance is restricted to those eligible for categorical assistance such as

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[47]42 U.S.C. § 1396a; Iowa State Department of Social Services Employees' Manual, pp. XII-1-10a, 10b.

AFDC,[48] and the clarity with which medical assistance under Title XIX includes pre-natal care, Congress must have understood that unborn children were included in AFDC coverage as dependent children. To conclude otherwise is to conclude that Congress meant to construct a totally arbitrary and capricious distinction between pregnancy "rookies" and "veterans" with regard to the availability of pre-natal medical care under Title XIX.[49]

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[48]Title XIX does permit states, at their option, to provide medical assistance to certain individuals not eligible for "categorical" assistance. 42 U.S.C. § 1396a(a); 45 C.F.R. § 248.10(b)(5). However, even this optional assistance would be available only to non-AFDC recipients who were under 21 years old, over 65 years old, or blind or disabled. 42 U.S.C. § 1396d(a). In any event, Iowa does not provide this optional assistance. Iowa State Dept. of Social Services Employees' Manual, pp. XII-1-10a, 10b.

[49]Although there may be some overlap between Title V and Title XIX services with regard to pregnant women and infants, 42 U.S.C. § § 701 *et seq.* do not specify what services should be provided under State plans, and, Title XIX services are far more comprehensive. For example, Title V services do not include physician's services (although state plans may provide for pre-natal clinics). *See,* S. Rep. No. 744, 90th Cong., 1st Sess., Nov. 14, 1967, reported in 1967 U.S. Code Cong. & Adm. News 2834, 3034-35. Moreover, at least as of 1967, Title V programs apparently were not operating in all counties in the United States. *Id.* Congress, in passing Title XIX, clearly recognized that Title V was not sufficient to meet the medical needs of mothers and infants, since it included AFDC recipients in the groups who were entitled to Title XIX assistance.

4. The Social Security Amendments of 1950 demonstrate Congressional intent to require the inclusion of unborn children in state AFDC programs.

The conclusion that the purposes of Title IV require the inclusion of unborn children in the "dependent children" eligible for AFDC assistance is strongly supported by the Social Security Amendments of 1950. These Amendments first added to the Act Section 402(a) (10),[50] the provision which this Court has held requires the provision of AFDC assistance to all individuals eligible under the definitional standards of 42 U.S.C. § 606. *Townsend v. Swank, supra; Carleson v. Remillard, supra.* This addition of Section 402(a) (10) in 1950 is particularly significant because at that time, the Bureau of Public Assistance, the agency charged with the administration of ADC, had already publicly interpreted the term "dependent child" in Section 406(a) to include unborn children.[51] Thus, according to the agency charged with administering ADC, unborn children were eligible for ADC assistance when Congress enacted the statutory provision that required payment of ADC to "all eligible individuals."

Moreover, the Social Security Amendments of 1950 first included, in the definition of "aid to dependent children" in Section 406(b) of the Act, funds to meet the needs of the parent or other relatives with whom eligible "dependent children" were living.[52] This

[50]Social Security Amendments of 1950, § 321(b), 64 Stat. 550 (1950).

[51]Handbook of Public Assistance Administration, Part IV, § 3412(6) (1946). See also text accompanying notes 66 - 70, *infra.*

[52]Social Security Amendments of 1950, § 323, 64 Stat. 551 (1950).

amendment was an explicit recognition that the needs of the child could be met only if those of the caretaker relative also were met–a fact which applies with particular force to needy unborn children.

5. The provisions of the Social Security Act other than 42 U.S.C. §606(a) are not helpful in resolving the issues in this case.

Petitioners' argument with regard to the meaning of "dependent child" consists primarily of a listing of various out-of-context phrases and provisions from Title IV–none of them from 42 U.S.C. § 606(a)–which Petitioners assert would not make sense "if the word 'fetus' were substituted for the word 'child' " therein.[53]

[53]While the Petitioners attempt to construct an argument out of isolated sections of the Social Security Act, a potential *amicus* herein goes even farther afield to search for support. Thus, the Brief as Amicus Curiae in Support of Appellant [sic] on Behalf of Pacific Legal Foundation (at 7-9) points to the use of the word "child" in such diverse statutes as 30 U.S.C. § 922(a)(3) (benefits for victims of black lung disease), 8 U.S.C. § 1401(a) (establishment of U.S. citizenship), and 26 U.S.C. § 151 (dependent for tax exemption purposes). Interestingly, the *amicus* is only able to assert with regard to 30 U.S.C. § 922(a)(3) that "it has never been *contended* that the program was intended to benefit the unborn. . . ." (Brief at 7; emphasis added.) More importantly, the *amicus* ignores the fact that the statutes cited in its brief have totally different purposes from those of Title IV the Social Security Act. There certainly is no comparison, for example, between the concerns of the Social Security Act and those of the statutes which define the circumstances under which one will become a citizen of the United States. As has been shown above, the purposes of the Social Security Act are central to the proper interpretation of the term "dependent child" in this action, and thus citations to statutes with totally different purposes are simply not helpful. Moreover, as discussed more fully *infra*, the inclusion of unborn children in the term "dependent child" for AFDC purposes is supported by long-standing administrative interpretation – a factor not present with regard to the diverse statutes cited by the *amicus*.

Petitioners' Brief at 9-10. This argument by listing suffers from at least two obvious flaws.

First, contrary to the Petitioners' assertion, some of the provisions which they cite do make sense with regard to both unborn children and born children. For example, Petitioners emphasize the word "living" in the phrase "with whom they [children] are living";[54] indeed, "a child is 'living with' his mother more directly *in utero* than at any other time." *Carver v. Hooker, supra*, 501 F.2d at 1246.[55]

Second, and more importantly, most of the provisions to which Petitioners point are designed to deal with special problems posed by particular groups of children who are eligible for AFDC assistance, and have no effect on eligibility under 42 U.S.C. § 606. For example, Petitioners point to 42 U.S.C. § 602(a)(7), which provides that the states should, "in determining need, take into consideration income and resources of any child . . . ." The Petitioners' argument seems to be that since an unborn child cannot have income, and hence § 602(a)(7) could not apply to such a child, the entire Social Security Act is inapplicable to the unborn. But the fact that a particular section of the Act does not apply to unborn children does not mean that the entire Act is inapplicable. Section 602(a)(7) simply reflects the fact that those few children who happen to

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[54]"A child in the mother's womb is living." *Black's Law Dictionary* (4th Rev. Ed. 1968) (Definition of "living").

[55]The phrases quoted by Petitioners from 42 U.S.C. §§ 602(a)(16), 604(b), and 605(c) similarly "apply quite as well to the unborn as to the born child." *Carver v. Hooker, supra* at 1247-48.

have income pose special problems with regard to determining need; but this obviously does not mean, as Petitioners' argument logically would imply, that only children with income would be eligible for AFDC assistance.

Similarly, the Petitioners' argument with regard to 42 U.S.C. § 602(a) (17) (A) (i) (which provides that states should attempt to establish the paternity of children "born out of wedlock"), apparently is that this provision restricts AFDC coverage to born children. The Petitioners, however, do not explain why the "logic" of this argument does not also serve to limit AFDC coverage to illegitimate children–since § 602(a) (17) (A) (i) clearly applies only to such children. Again, it is clear that § 602(a) (17) (A) (i) is designed to deal with a particular problem that is presented by some–but certainly not all, or even most–children eligible for AFDC assistance. In short, "the fact that *certain* of the Act's provisions can sensibly be applied only to a child who is born does not necessarily exclude the unborn from the Act's ambit." *Parks v. Harden*, ____ F.2d ____ (Addendum A, *infra* at a21).[56]

[56]Similarly, the language quoted by Petitioners from 42 U.S.C. § § 606(a)(8)(A)(ii), 602(b)(2), and 605 deals only with special problems not related to eligibility. Section 602(a)(8)(A)(ii) is not distinguishable in this regard from § 602(a)(7) (discussed above); Section 602(b)(2) (which was made ineffective by this Court's decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969)) was simply aimed solely at curbing hardships resulting from excessively long state-imposed residency requirements, *Shapiro v. Thompson, supra* at 639-40, and not at § 606's definitional eligibility standards; and § 605 is intended to deal with special problems resulting from parental neglect, and not to require such neglect as a condition of eligibility.

6. The existence of other public assistance programs does not imply Congressional intent to exclude unborn children and their mothers from the AFDC program.

In support of their contention that Congress intended to exclude unborn children from the definition of "dependent child" in 42 U.S.C. § 606(a), Petitioners argue that:

> Congress, in limiting the AFDC program to children (rather than fetuses) was undoubtedly aware that needy prospective mothers would be granted alternative public assistance. Shelter, food, medical assistance and clothing are items included in Iowa's general relief program (Chapter 252, Code of Iowa, 1973). Congress in the food program, provides food stamps and double commodities for needy pregnant women.
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> Petitioners' Brief at 7-8.

However, none of these "alternative" welfare programs indicates an intention by Congress to exclude unborn children from the AFDC program, for a number of reasons.

First, with regard to Iowa's general relief program, Petitioners fail to point out that the provision of assistance under that program is totally discretionary, on a county-by-county basis.[57] Moreover, nothing in the record of this case indicates that the level of assistance (if any) typically granted by Iowa counties has ever been equivalent to the assistance provided under Title

[57] *See*, Sections 252.1, 252.27, 252.31-252.34, Code of Iowa (1973).

IV.[58] In any event, Petitioners' argument that Congress would have taken "legislative notice" of the availability of county relief programs proves too much: If the availability of such programs would have motivated Congress not to provide assistance to pregnant women on behalf of their unborn children, why would it not also have motivated Congress to rely on such assistance for *born* children?

Nor are the Petitioners' references to federal food programs relevant. Since the Food Stamp Act was not enacted until 1964,[59] it is difficult to see how its provisions could have affected the issue of whether unborn children were included in the definitions of 42 U.S.C. § 606(a). Moreover, the Food Stamp Act clearly has not been interpreted as a substitute for public assistance such as AFDC, since AFDC recipients are

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[58]In this regard, it is interesting to note that in 1946, the Iowa Department of Social Welfare publicly complained that even with regard to those who were receiving ADC benefits, only some Iowa counties were providing adequate supplemental assistance through general relief. Iowa State Department of Social Welfare, *Annual Report* 9 (1946). In a very real sense, the fact that Petitioners are involved in this lawsuit demonstrates that "alternative public assistance" through general relief programs is not comparable to AFDC assistance: If it were clear that the exclusion of unborn children from AFDC assistance simply would result in their being adequately protected by state and local government funds, the State of Iowa would have no interest in opposing this action (and refusing to participate in H.E.W.'s "optional" program of AFDC assistance for unborn children), since the result of their "winning" would be to impose additional financial burdens on the state and its governmental subdivisions.

[59]Food Stamp Act of 1964, 78 Stat. 703 (1964); 7 U.S.C. §§ 2011-2026.

eligible for food stamp assistance under federal statutes and regulations.[60]

Finally, 42 U.S.C. § 1786, which provides for a "supplemental food" program for pregnant and lactating women who fall in certain categories and live in certain geographical areas, also does not imply that Congress intended to omit unborn children and their mothers from AFDC coverage. In the first place, § 1786 was not enacted until 1972,[61] and, as in the case of the Food Stamp program, it is therefore hard to see how this could have influenced unborn child coverage under Title IV. Moreover, as demonstrated by the amicus brief filed herein by the State of Arizona, the supplemental food program envisaged by § 1786 need not cover all of the political subdivisions of a state. Arizona Amicus Brief at 9-10.[62] Finally, § 1786 on its face is a

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[60] *See,* 7 U.S.C. §§ 2019(d), 2019(e)(7); 7 C.F.R. § 271.4(a)(1); 45 C.F.R. § 233.20(a)(2)(4)(a). In terms of the adequacy of Food Stamps as a replacement for AFDC assistance, it is interesting to note that a study in Sacramento County, California, showed that at least 90% of AFDC families were unable to maintain food purchasing power at the level of the USDA low-cost plan, and that two-thirds of such families were able to afford no more than 75% of USDA's recommended minimum expenditure – figures which reflected the inclusion of the value of bonus food stamps in the purchasing power of the surveyed families participating in the food stamp program. California Assembly Committee on Health and Welfare, *Malnutrition: One Key to the Poverty Cycle* 12 (January, 1970).

[61] Pub. L. 92-433, § 9, 86 Stat. 729 (1972).

[62] Indeed, those programs specifically are limited to "residents of areas *served by clinics or other health facilities* determined to have significant numbers of infants and pregnant and lactating women at nutritional risk." 42 U.S.C. § 1786(d) (emphasis added).

supplemental food program—as is demonstrated by the fact that it covers lactating women and infants who are also eligible for AFDC benefits.[63]

C. Long-standing Interpretation of 42 U.S.C. §606(a) by the Agencies Charged with the Administration of the AFDC Program Establishes that Unborn Children Must be Included in AFDC Coverage.

Any doubts about the inclusion of unborn children in the term "dependent child" in 42 U.S.C. § 606(a) are removed by the long-standing interpretation of that term by the agencies charged with the Act's enforcement—an interpretation which clearly includes unborn children. The Code of Federal Regulations, 45 C.F.R. § 233.90 provides in pertinent part that:

> (c)(2) Federal financial participation is available in:
>
> * * *
>
> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis . . . .

Moreover, 45 C.F.R. § 233.90(c)(3) provides that

> Federal financial participation (at the fifty percent rate) is available in any expenses incurred in establishing *eligibility* for AFDC, *including expenses incident to obtaining necessary information to determine the . . . pregnancy of a mother.*
>
> (Emphasis added.)

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[63]Moreover, in 1973, the Iowa Department of Social Services noted that its Supplemental Feeding Program had been hampered by the stopping of federal funds. *Annual Report* 9 (1973).

Thus, under the federal regulations that govern the AFDC program, states may receive federal matching funds for AFDC payments with respect to unborn children. As noted by many of the lower courts that have ruled on the eligibility of unborn children for AFDC assistance, the provision of matching funds for AFDC assistance to the mothers of unborn children must logically be based on H.E.W.'s interpretation of the term "dependent child" in 42 U.S.C. § 606(a) to include unborn children, since otherwise there simply would be no authority in the Social Security Act for such payments.[64] Moreover, as these same courts have held, if the term "dependent child" is defined to include unborn children, then under *Townsend v. Swank* and *Carleson v. Remillard, supra*, the participating states *must* include unborn children in AFCD coverage unless there is clear Congressional authorization for their exclusion. None of the lower courts has found such authorization.

The conclusion that H.E.W. has interpreted the statutory term "dependent child" to include unborn children need not rest solely on the logic outlined above. The history of 45 C.F.R. § § 233.90(c) (2) and 233.90(c) (3) also shows conclusively that for over thirty years H.E.W. consistently has based its funding of AFDC assistance with respect to unborn children on

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[64]*See, e.g., Carver v. Hooker, supra,* at 1247; *Alcala v. Burns, supra,* 494 F.2d at 746; *Doe v. Lukhard, supra,* 493 F.2d at 60; *Alcala v. Burns, supra,* 362 F.Supp. at 185; *Doe v. Lukard, supra,* 363 F.Supp. at 826-27; *Wisdom v. Norton,* 372 F.Supp. 1190, 1192 (D. Conn. 1974), reversed, ____ F.2d ____ (2d Cir. 1974) (Petitioner's Brief at 19).

that interpretation.[65] The present regulations grew directly out of a 1940 audit exception to the Wisconsin ADC program, which had been paying ADC assistance on behalf of unborn children.[66] In considering this audit exception, the Social Security Board and the Bureau of Public Assistance (the division of the Board in charge of ADC) consistently regarded the issue as being one of definitional eligibility under §406 of the Social Security Act.[67]

Thus, in a Memorandum of May 27, 1940, the Bureau of Public Assistance, Division of Standards and Procedures, recommended that

> payments to an appropriate relative who is otherwise eligible to receive aid to dependent children may include an amount for an unborn child *to whom the terms of the definition in Section 406* of the Federal Social Security Act *may be found presumptively to obtain.*
>
> (Addendum E, *infra*) (emphasis added).

Subsequently, a Memorandum of July 3, 1940, from the Bureau of Public Assistance to the Chicago Regional Director, giving the latter advance information regarding the thinking of the conference of the Social Security Board on the unborn child issue, stated that

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[65]The optionality of that funding clearly has been based on H.E.W.'s additional interpretation – rejected by this Court in *Townsend* and *Remillard* – that 42 U.S.C. § 606 merely defined the outer limits of State participation in the AFDC program. See notes 5-7, *supra.*

[66]*Doe v. Lukhard*, 363 F.Supp. 823, 829 (E.D. Va. 1973); *Parks v. Harden*, 354 F.Supp. 620, 625 (n. 5) (N.D. Ga. 1973); Memorandum of June 25, 1940, from Bureau of Public Assistance to Chicago Regional Director (Addendum D., *infra*).

[67]42 U.S.C. § 606.

> [i]t was the consensus of the conference that legally it was possible to recognize the existence of a child prior to its birth. For purposes of Federal matching, therefore, *it is felt that section 406(a) of the Social Security Act governing the age of a dependent child could be interpreted to include a child prior to its birth.*

(Addendum F, *infra*) (emphasis added).

A Summary of Board Action dated May 21, 1941, indicated that the question of the "proposed interpretation of Section 406(a)" to include unborn children in the ADC program was deferred until the next meeting. (Addendum G, *infra*). A Memorandum of the same date from A.D. Smith to the Assistant General Counsel, arguing for the inclusion of unborn children in the AFDC program, noted that the issue of the coverage of unborn children had been under advisement "practically ever since the beginning of the program." Moreover, Smith noted that unborn child coverage was consistent with the remedial purposes of AFDC legislation, and further stated that "what we are doing is once more simply to define the word 'child.'" (Addendum H, *infra* at 1, 2.)[68]

The decision of the Social Security Board permitting Wisconsin's payment of ADC assistance with respect to

[68]This Memorandum of A.D. Smith referred to an earlier "lengthy memorandum" which Smith had drafted in 1939 on the same issue. That Memorandum, dated March 23, 1939, also argued that "[a]fter all, we are merely construing the word "child." (Addendum I, *infra.*) It is interesting to note that the A.D. Smith Memorandum of May 21, 1941, contains the notation "Definition of Dependent child" in the upper right hand corner, apparently for filing purposes.

unborn children was communicated to the Chicago Regional Director in a Memorandum of August 23, 1941, from Peter Kasius, the Acting Director of the Bureau of Public Assistance. (Addendum J; *infra*.) That Memorandum indicated that the decision in the Wisconsin case could be used as precedent in future cases in which other States wished to include unborn children in their ADC programs "by similar interpretation." Unborn children were referred to as "children now covered by section 48.331 of the Wisconsin statutes."[69]

These decisions by the Social Security Board, all of which clearly were regarded as interpretations of the terms of § 406 of the Social Security Act, were formalized in 1946 in the Handbook of Public Assistance Administration, Part IV, § 3412. Section 3400 of that Part, in introducing the following sections, stated that "[s]everal factors combine to make up the *definition of 'dependent child'* as used in Title IV of the Social Security Act." (Emphasis added.) Section 3412 itself made clear that it was an "interpretation" of Section 406(a); and § 3412(6) specifically provided that:

> When the mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to *other children*.
> (emphasis added.)

Section 3412 of the Handbook of Public Assistance Administration, *supra*, has now been codified in

[69]Like the A.D. Smith Memorandum of May 21, 1941, the top of this Memorandum included the notation "Definition of dependent child."

somewhat altered form in 45 C.F.R. §§ 233.90(c) (2) and (3). As shown above, although these provisions, like their predecessors in the Handbook, do not directly define "dependent child," it is clear from their history and from the structure of the Social Security Act that those regulations are based on the Social Security Board's original interpretation of "dependent child." This was confirmed in Policy Information Release No. 37 of the H.E.W. Welfare Administration Bureau of Family Services (February 4, 1965) (Addendum K, *infra*). That Release consistently refers to unborn children as "children"—and stresses that "[a] State may include unborn children in its approved AFDC plan and received Federal financial participation in payments to meet their need, if such children meet the definition of "dependent child" in Section 406(a) of the Act."[70]

The Second Circuit Court of Appeals in *Wisdom v. Norton, supra*, in reaching the conclusion that unborn children and their mothers are not eligible for AFDC assistance under 42 U.S.C. § 606(a), relied heavily on the position taken in an H.E.W. amicus brief in *Adams v. Huecker* (Civ. No. 7815-B, U.S.D.C., W.D. Ky.) that the term "dependent child" does not include unborn children, and that its extension of federal assistance, at the States' option, for AFDC payments with regard to unborn children is based upon H.E.W.'s rulemaking power under 42 U.S.C. § 1302.[71] But as shown above,

[70]The Policy Release specifically disapproved the practice of granting AFDC assistance on behalf of unborn children whose mothers had already borne other children, but not on behalf of those whose mothers had borne no other children.

[71] *Wisdom v. Norton, supra*, Petitioners' Brief at 30-31.

the position taken by H.E.W. in *Adams* clearly ignores a long-standing history of interpretation by H.E.W. and its predecessor agency that an unborn child is a "dependent child" for AFDC purposes.[72]

Moreover, H.E.W.'s new-found position in *Adams* with regard to its powers under 42 U.S.C. § 1302 is as untenable as its earlier position, rejected in *Townsend* and *Remillard*, that 42 U.S.C. § 606(a) merely defined the "outer limits" of AFDC eligibility and that the states could vary eligibility requirements within those outer limits. Section 1302 merely gives to the Secretary of H.E.W. the power to make such rules and regulations, "*not inconsistent with this chapter*, as may be *necessary* to the *efficient administration* of the functions with which [he] is charged under this chapter." (Emphasis added). Certainly it cannot sensibly be argued that the payment of AFDC assistance to unborn children is "necessary to the efficient administration" of the AFDC program, unless unborn children are eligible as "dependent children" under 42 U.S.C. § 606(a).[73]

Finally, 42 U.S.C. § 1304 specifically provides that "[t]he right to later, amend, or repeal any provision of this chapter is reserved to the Congress." Clearly,

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[72]The *Wisdom* court apparently was unaware of this history. See Petitioners' Brief at 30, n. 36.

[73]This is particularly clear when such payments are optional with the states: If the program is necessary to the administration of AFDC in one state, it is difficult to see why it is not equally necessary in the other states as well – or why it is the states, rather than the Secretary of H.E.W., which determine whether the payments with respect to unborn children are so necessary.

Congress did not intend in § 1302 to give the Secretary of H.E.W. blanket authority to create new programs or classes of eligible individuals on behalf of whom Title IV funds could be expended. Such a "blank check" would in effect give the Secretary a right to legislate that is specifically reserved to Congress by Section 1304.

With regard to H.E.W.'s position in *Adams v. Huecker, supra*, it is interesting to note that as recently as the issuance of the district court's supplemental opinion in *Wilson v. Weaver*, 358 F.Supp. 1147 (N.D. Ill. 1973), H.E.W., through its amicus brief in that case, was justifying its policy of paying AFDC matching funds on behalf of unborn children at the options of the states on the related theories (1) that the meaning of the term "dependent child" was unclear, while the meanings of "parent" and "continued absence" in *Townsend* and *Remillard* were clear, and (2) that the provisions of 42 U.S.C. § 606 were not mandatory on the states. 358 F.Supp. at 1153.[74] H.E.W. made no mention of 42 U.S.C. § 1302 in the *Wilson* case—and apparently did not do so until its May 2, 1974, amicus brief in *Adams v. Huecker, supra.*[75] Given the long-standing interpretation by the Bureau of Public Assistance and H.E.W. of the words "dependent child" as including unborn children, and the untenability of H.E.W.'s newly discovered position with regard to its powers under 42 U.S.C. § 1302, the shifting of H.E.W.'s justification for its optional unborn child program

[74]The District Court in *Wilson v. Weaver* properly rejected both of these arguments on the authority of *Townsend* and *Remillard. Id.*

[75]*See, Wisdom v. Norton, supra,* Petitioners' Brief at 31, n. 38.

seems simply to be an effort to evade the consequences of this Court's holdings in *Townsend v. Swank* and *Carleson v. Remillard* with regard to the mandatory nature of the eligibility definitions in 42 U.S.C. § 606(a).

From the preceding analysis, it is clear that the long-standing interpretation of the words "dependent child" in 42 U.S.C. § 606 by the agencies charged with the administration of AFDC includes unborn children. That interpretation should be given great weight by this Court, and "should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."[76] As noted above, there not only is no compelling indication that the interpretation of "dependent child" to include unborn children for AFDC purposes is wrong, but every indication that this interpretation is consistent with the purposes of the Social Security Act. Hence, it should be followed by this Court.[77]

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[76] *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 381 (1969); *see also, Zemel v. Rusk*, 381 U.S. 1, 10-11 (1965); *Lewis v. Martin, supra; Alcala v. Burns, supra*, 494 F.2d at 746; Note, "Statutory and Constitutional Bases for Extending AFDC Benefits to Families with Unborn Children," 48 So. Calif. L. Rev. 121, 138 (1974).

[77] This conclusion is also supported by the fact that 42 U.S.C. § 602(a)(10), the provision which makes 42 U.S.C. § 606's eligibility definitions mandatory on the states, was enacted after the publication by the Bureau of Public Assistance, in the Handbook of Public Assistance Administration, Part IV, § 3412 (1946), of its interpretation of the term "dependent child" in 42 U.S.C. § 606(a) as including unborn children. Social Security Amendments of 1950, § 321(b), 64 Stat. 550 (1950). Moreover, as noted in *Parks v. Harden, supra*, (Addendum A at a23), and *Carver v. Hooker, supra*, 501 F.2d at 1246-47, Congress in 1972 rejected proposed amendments to Title IV which would specifically have excluded unborn children from eligibility for AFDC assistance.

While H.E.W.'s interpretation of "dependent child" should be followed, it is clear that H.E.W.'s position that unborn child coverage is optional with the states is unacceptable:

> the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402 (a) (10) that aid be furnished "to *all eligible* individuals."
>
> *Townsend v. Swank, supra*, 404 U.S. at 286.

In this regard, the State of Florida, in its Amicus Brief (at 20), complains that to give weight to one administrative interpretation while rejecting another would be "illogical." But to say that weight should be given to one statutory interpretation by an administrative agency certainly is not to say that all such interpretations must be accepted. Thus, for example, in *Carleson v. Remillard, supra*, this Court took account of H.E.W.'s interpretation of "continued absence" as including military absences, but refused to accept H.E.W.'s position that coverage of children whose parents were "militarily" absent was optional with the states. 406 U.S. at 602.[78]

In this action, H.E.W.'s long-standing interpretation of the words "dependent child" is entitled to considerable weight; but the administrative judgment

[78] Indeed, it is Florida's position which does not make sense: That position would require either that *all* judgments of an administrative agency be accepted, or that *none* of them be given weight. But, clearly, an administrative agency may be correct about some things and wrong about others – as *Carleson* demonstrates.

with regard to optionality clearly has been rejected by this Court. Where the words of the statute do not themselves give clear guidance, and where the purposes of the Social Security Act point strongly toward inclusion of unborn children in the AFDC program, the administrative agencies' long-standing interpretation of the term "dependent child" should be followed.

CONCLUSION

As shown above, although the language of the Social Security Act itself is not clear, both the purposes of the Social Security Act and long-standing administrative interpretation show that unborn children are "dependent children" for AFDC eligibility purposes—a conclusion that has been reached by five of the six Circuit Courts of Appeal that have ruled on this issue.[79] Moreover, although the constitutional issues raised by the Respondents at the district court level are not directly involved in this Court, the conclusion that unborn children are "dependent children" under 42 U.S.C. § 606(a) also is reinforced by the fact that it avoids the necessity of passing on those constitutional

[79]See note 3, *supra*. Significantly, the only "minority" Circuit Court of Appeals opinion relied in substantial part on an H.E.W. disavowal of its long-standing interpretation of the words "dependent child" to include unborn children – a disavowal which ignored both the history of crucial H.E.W. regulations (history apparently unknown to the Circuit Court) and relied on an untenable view of H.E.W.'s rule-making powers under 42 U.S.C. § 1302.

issues.[80] Thus, although Congress has "voiced its wishes in muted strains," discovery of the "theme in the cacophony of political understanding" of the Social Security Act clearly requires the inclusion of unborn children among the needy children who are protected under Title IV of that Act.

For the reasons stated above, the decision of the Court of Appeals for the Eighth Circuit in this action should be *affirmed*.

Respectfully Submitted,

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[80] *Townsend v. Swank, supra,* 404 U.S. at 291. *See also, Carver v. Hooker, supra,* 501 F.2d at 1248; *Whitfield v. Minter,* 368 F.Supp. 798, 804 (D. Mass. 1973); Note, "Statutory and Constitutional Base for Extending AFDC Benefits to Families with Unborn Children," 48 So. Calif. L. Rev. 121, 144-55 (1974).

ADDENDUM A

1380

Ruth PARKS, Individually and for all others similarly situated, Plaintiff-Appellant,

v.

Richard HARDEN, Individually and as the Commissioner of the Department of Human Resources, Defendant-Appellee.

Mrs. Alice L. HARRIS and Mrs. Mary E. Hood, Individually, on behalf of their unborn children, and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

MISSISSIPPI STATE DEPARTMENT OF PUBLIC WELFARE et al., etc., Defendants-Appellants.

Nos. 73-1855 and 73-3220.

United States Court of Appeals, Fifth Circuit.

Dec. 2, 1974.

Class actions were brought raising the issue whether unborn children were eligible individuals under the aid to families with dependent children program. The United States District Court for the Northern District of Georgia, at Atlanta, Sidney O. Smith, Jr., J., 354 F.Supp. 620, held that unborn children were not eligible. The United States District Court for the Northern District of Mississippi at Aberdeen, Orma R. Smith, J., 363 F.Supp. 1293, held that unborn children were eligible and appeals were taken. The Court of Appeals, Wisdom, Circuit Judge, held that unborn children are eligible individuals under the Social Security Act, and states' denial of AFDC benefits to expectant mothers strictly on the basis of the fetal status of their children contravenes the Act and is violative of the supremacy clause.

Judgment in first action reversed and judgment in second action affirmed.

Ainsworth, Circuit Judge, filed dissenting opinion.

1. Social Security and Public Welfare ⇐194

An unborn child's lack of status as a "person" for Fourteenth Amendment purposes does not affect the status of an unborn child as a "child" within language of the Social Security Act. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; U.S.C.A.Const. Amend. 14.

2. Civil Rights ⇐13.6
Social Security and Public Welfare ⇐194

Rights of the mother to AFDC benefits are not derivative but direct and mother has standing to assert those rights in civil rights action. 42 U.S.C.A. § 1983; Social Security Act, § 406(b)(1), 42 U.S.C.A. § 606(b)(1).

3. Courts ⇐406.9(9)

Class actions involving federal-state aid to mothers of unborn children would not be remanded for convocation of a three-judge court where constitutional claim was not raised in one action and was not considered in the other and Court of Appeals resolved controversy on statutory basis. 42 U.S.C.A. § 1983; Social Security Act, § 406(b)(1), 42 U.S.C.A. § 606(b)(1); 28 U.S.C.A. §§ 1253, 1292(a)(1), 2281.

4. Social Security and Public Welfare ⇐5

State may not deny benefits to an entire class of individuals eligible under the Social Security Act. Social Security Act, §§ 402(a)(10), 406(a), 42 U.S.C.A. §§ 602(a)(10), 606(a).

5. States ⇐4.12

State regulations contrary to provisions of Social Security Act are invalid under the supremacy clause. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; U.S.C.A.Const. art. 6, cl. 2.

6. Social Security and Public Welfare ⇐194

Federal rather than state standards determine eligibility under the joint federal and state aid to families with dependent children program. Social Security Act, § 406(a), 42 U.S.C.A. § 606(a).

7. Social Security and Public Welfare ⇐2

Social Security Act is not so elastic that HEW can stretch its language to cover individuals not intended by Congress to be eligible. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.

8. Social Security and Public Welfare ⇐194

HEW did not act ultra vires in permitting AFDC benefits to be paid to expectant mothers. 42 U.S.C.A. § 1983; Social Security Act, § 401, 42 U.S.C.A. § 601.

9. Social Security and Public Welfare ⇐194
States ⇐4.12

Unborn children are eligible individuals under the joint federal and state aid to families with dependent children program, and states' practices of denying AFDC benefits to expectant mothers strictly on the basis of the fetal status of their children contravenes the act and is therefore violative of the supremacy clause. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; U.S.C.A.Const. art. 6, cl. 2.

Appeal from the United States District Court for the Northern District of Georgia.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

WISDOM, Circuit Judge:

These two class actions involving federal-state aid to mothers of unborn children require this Court to consider for the first time issues litigated in a number of other federal courts

during the past two years: Does the failure of a state to provide benefits to mothers of unborn children under the joint federal and state Aid to Families with Dependent Children (AFDC) program contravene provisions of the Social Security Act? Does the Act deny to unborn children or their mothers the equal protection of the laws? The plaintiffs[1] would, of course, have us answer in the affirmative. They cite a series of decisions by the United States Supreme Court,[2] as well as the language of the Act itself, to demonstrate that unborn children are eligible individuals under the Act, and that to fail to provide benefits to them in the face of such statutory eligibility violates the Supremacy Clause. Straining at the traces imposed by Roe v. Wade, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, Plaintiff Parks also urges that the denial of AFDC benefits to unborn children simply on the basis of their fetal status denies them the equal protection of the laws, or, at minimum, violates the right to equal protection of the plaintiff mothers.

The Attorneys General of Georgia and Mississippi, defendants in the two actions, respond in kind: there is nothing either in the language of the Social Security Act or its legislative history to indicate a Congressional intent to include unborn children in the AFDC program. Although the Department of Health, Education and Welfare (HEW) *permits* a state to make AFDC payments to expectant mothers, they argue, such benefits are clearly optional. In dismissing the constitutional argument, the State of Georgia cites Roe v. Wade and concludes that since an unborn child is not a person within the meaning of the Fourteenth Amendment, "the State has created no classification which is subject to judicial scrutiny."

1. In Parks v. Harden the class action plaintiff appealed; in Harris v. Mississippi the State Department of Public Welfare appealed.

2. King v. Smith, 1968, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; Townsend v. Swank, 1971, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448; Carleson v. Remillard, 1972, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352.

In these two cases the district courts reached opposite conclusions. In Parks v. Harden, the District Court for the Northern District of Georgia, concluding that an unborn child simply was not a child within the meaning of the Act, dismissed the cause of action and dissolved the temporary restraining order it had entered orally pending its decision on the merits.[3] 354 F.Supp. 620. On the other hand, the District Court for the Northern District of Mississippi held that unborn children were "eligible individuals" under the Act, and that Mississippi could not, therefore, deny them AFDC benefits. 363 F.Supp. 1293. Concurring as we do with the latter reading of the applicable law, we affirm the judgment in No. 73–3220, Harris v. Mississippi State Department of Public Welfare, and reverse the judgment in No. 73–1855, Parks v. Harden.

I.

Before we address the substantive issues raised by these appeals, we consider several questions, "jurisdictional" in a broad sense, which are not directly raised by the parties here, but have concerned other district or circuit courts confronting the same issue we address today.[4] The first is an outgrowth

3. Although the constitutional questions outlined in the text are raised on appeal, they were not considered by the district court, since the parties stipulated their insubstantiality.

4. More than two dozen courts have considered the problem in one form or another. Four Courts of Appeals have addressed the issue on the merits; all have reached the result we reach: Carver v. Hooker, 1 Cir. 1974, 501 F.2d 1244, [No. 74–1079]; Wilson v. Weaver, 7 Cir. 1974, 499 F.2d 155, [No. 73–1541]; Alcala v. Burns, 8 Cir. 1974, 494 F.2d 743, petition for cert. filed, 42 U.S.L.W. 3642 (May 15, 1974) [No. 73–1708]; Doe v. Lukhard, 4 Cir. 1974, 493 F.2d 54, petition for cert. filed, 42 U.S.L.W. 3667 (May 24, 1974) [No. 73–1763]. The Third Circuit Court of Appeals has also entertained an appeal on the issue, but vacated and remanded the case for convocation of a three-judge court and did not reach the merits. Murrow v. Clifford, 3 Cir. 1974, 502 F.2d 1006.

In addition to the two district court decisions on appeal here, Harris v. Mississippi State Department of Public Welfare, N.D.Miss. 1973, 363 F.Supp. 1293, and Parks v. Harden, N.D.Ga.1973, 354 F.Supp. 620, at least eighteen other district courts have considered

of the holding in Roe v. Wade that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729, 35 L.Ed.2d at 180. Since we conclude that the plaintiffs are entitled to AFDC benefits under the Social Security Act, we need not reach the equal protection argument advanced by Parks on appeal. Yet *Roe*'s denial of fetal personhood nonetheless must be taken into account.

[1] An unborn child's lack of status as a "person" for Fourteenth Amendment purposes does not affect the status of an unborn child as a "child" within the language of the Act;[5]

the issue of AFDC and to unborn children on the merits. Four reached the conclusion arrived at in Parks v. Harden and denied AFDC benefits to the unborn. Murrow v. Clifford, D.N.J. [Civ. Act.No. 114-73] (June 12, 1973) (letter memorandum), vacated and remanded, 502 F.2d 1406 (3 Cir. 1974); Mixon v. Keller, M.D.Fla. 1974, 372 F.Supp. 51; Poole v. Endsley, N.D.Fla.1974, 371 F.Supp. 1379; Geisler v. Endsley, N.D.Fla. [No. 74-3] (March 4, 1974).

The other fourteen district court decisions we have found have all held that states taking part in the AFDC program must provide benefits to mothers of unborn children. Tapia v. Vowell, S.D.Tex. [Civ.Act.No. 73-B-169] (November 11, 1973); Tillman v. Endsley, S.D.Fla. [No. 73-1476-Civ.-CF] (March 11, 1974); Jones v. Graham, D.Neb. [CV 73-L-235] (September 5, 1973); Morris v. Houston, W.D.Mich. [No. G250-73 Ca-5] (October 29, 1973) (temporary restraining order granted); Taylor v. Hill, W.D.N.C., 377 F.Supp. 495 (1974); Turner v. Shulims, W.D.Mo. [Civ.Act.No. 14CV 311-w-3] (, 1974) (preliminary injunction granted); Wisdom v. Norton, D.Conn.1974, 372 F.Supp. 1190; Carver v. Hooker, D.N.H.1973, 369 F.Supp. 204, aff'd, 501 F.2d 1244 [No. 74-1079] (1974); Whitfield v. Minter, D.Mass.1973, 368 F.Supp. 798; Stuart v. Canary, N.D.Ohio 1973, 367 F.Supp. 1343; Green v. Stanton, N.D.Ind.1973, 364 F.Supp. 123, aff'd, 499 F.2d 155 (7 Cir. 1974); Doe v. Lukhard, E.D.Va.1973, 363 F.Supp. 823, aff'd, 1974, 493 F.2d 54, petition for cert. filed, 42 U.S.L.W. 3067 (May 24, 1974) [No. 73-1763]; Alcala v. Burns, S.D.Iowa 1973, 362 F.Supp. 180, aff'd 1974, 494 F.2d 743, petition for cert. filed, 42 U.S.L.W. 3642 (May 15, 1974) [No. 73-1708]; Wilson v. Weaver, N.D.Ill 1972, 358 F.Supp. 1147, aff'd, 7 Cir. 1974, 499 F.2d 155 [No. 73-1541].

5. In an effort to prevent confusion, we shall refer to a child still carried by its mother as a "fetus" or and "unborn child". Children already born will be called just that, "born children" or "postpartum children". We intimate no opinion on the sensitive medical, theological, and philosophical questions involved in the debate over when life begins.

that a fetus is not constitutionally *entitled* as a person to claim certain benefits in no way affects the right or power of Congress to *extend* benefits to unborn children by appropriate legislation. The question for resolution here is whether Congress did so. See Carver v. Hooker, D.N.H.1973, 369 F.Supp. 204, 210 n. 23, aff'd 1974, 501 F.2d 1244 [No. 74–1079]; Alcala v. Burns, S.D.Iowa 1973, 362 F.Supp. 180, 186, aff'd, 1974, 494 F.2d 743, petition for cert. filed, 42 U.S.L.W. 3642 (U.S. May 15, 1974) [No. 73–1708]. Yet, at first blush, *Roe* might be thought to preclude even the statutory claim advanced by the plaintiffs under 42 U.S.C. § 1983, since Section 1983 requires that the "rights, privileges or immunities" of a "citizen of the United States or other *person* within the jurisdiction thereof" be abridged before there is a basis of liability for the deprivation. [Emphasis added].[6]

Reading the quoted passage from *Roe* together with the language cited above, at least one district court has concluded that "if an unborn is not a person under the Fourteenth Amendment[,] an unborn has no right of action under Section 1983 and [the] claim must fall." Poole v. Endsley, N.D.Fla. 1974, 371 F.Supp. 1379, 1382. Whatever the merits of extending *Roe*'s reach to Section 1983 actions, it is not necessary to reach that question here, for it is the rights of the expectant mother, rather than those of the fetus, which are at issue. Alcala v. Burns, 362 F.Supp. at 186.

The references to the AFDC program in the history of the Act make it clear that the Congressional objective is to furnish aid to needy mothers. Originally known as "Aid to Dependent Children", 49 Stat. 627, the program's name was altered by a 1962 Social Security Act amendment to "Aid and

6. Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

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Services to Needy Families with Children". Pub.L. 87–543, 42 U.S.C. § 601 (1970); see King v. Smith, 1968, 392 U.S. 309, 311 n. 1, 88 S.Ct. 2128, 2130, 20 L.Ed.2d 1118, 1122. And, currently, Part A of Title IV of the Act, which erects the AFDC structure and procedures, simply denominates its subject as "Aid to Families with Dependent Children". 42 U.S.C. § 601. One district court has evaded the clear import of this language, although in a constitutional rather than statutory context, by holding that the mother's rights under the AFDC program "are incidental to, and derived from, the statutory benefits conferred upon the children." Since the unborn child is not a person, the court reasoned, no benefits can be derived on its behalf by its mother, Murrow v. Clifford, D.N.J. [Civ. Act No. 114–74] (letter memorandum, June 12, 1973, at 3), vacated and remanded for assignment to a three-judge court, 502 F.2d 1066 (3 Cir. 1974). Thus, the court concluded, Roe v. Wade precludes even the mother's benefits on equal protection grounds.

[2] We do not find such reasoning persuasive, nor do we believe that Roe v. Wade can be used to support the view that the mother of an unborn child should be denied a cause of action under Section 1983. The definition in the Act of "aid to families with dependent children" makes it evident that Congress contemplated payments of AFDC benefits directly to the relative with whom a dependent child is living, to meet the relative's own needs:

> The term "aid to families with dependent children" means money payments *with respect* to . . . . a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law *to meet the needs of the relative with whom any dependent child is living* . . . .

42 U.S.C. § 606(b)(1) [emphasis added]. Under this language the rights of the mother are not derivative but direct. Although it is necessary for a relative to have an eligible dependent child living in the home for the relative to acquire

eligibility, the existence of such a condition precedent cannot render the relative's rights "incidental" in the face of statutory language to the contrary. If AFDC payments must be made with respect to unborn as well as postpartum children, then, the expectant mother herself has a right to receive them and standing to assert that right under Section 1983. See Carver v. Hooker, 369 F.Supp. at 210; Murrow v. Clifford, 3 Cir. 1974, 502 F.2d 1066.

The second jurisdictional difficulty is raised by the Third Circuit's treatment of Murrow v. Clifford, the only case other than Parks v. Harden in which a Court of Appeals has been presented with a determination that expectant mothers are *not* entitled to AFDC benefits under the Act. In *Murrow*, the class action plaintiffs brought their action for declaratory and injunctive relief on statutory and constitutional grounds, alleging first, that New Jersey's failure to authorize AFDC benefits with respect to unborn children conflicted with the Social Security Act and was therefore invalid under the Supremacy Clause, and second, that the state's refusal to provide the payments violated the mother's rights to the equal protection of the laws. Finding the Supremacy Clause claim to be without merit, the single district judge went on to adjudicate the equal protection claim, and again found against the plaintiffs. On appeal, the Third Circuit vacated the judgment and remanded the case, holding that the plaintiffs' constitutionally-grounded request for an injunction against a state regulation of statewide application could be considered only by a three-judge district court, and could be appealed only to the United States Supreme Court. See 28 U.S.C. §§ 2281, 1253.

The court also remanded the statutory Supremacy Clause claim,[7] because the interests of "sound judicial administration"

7. In referring to the plaintiffs' contention that the challenged state policies are inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause, we use the terms "statutory" or "Supremacy Clause" contention to differentiate it from the equal protection contention. In doing so, we do not mean to suggest that

dictated that it, too, be considered by the three-judge court. Although it had jurisdiction over the appeal from the district court's disposition of the statutory question,[8] the Court of Appeals reasoned, its decision affirming the district court would preclude consideration of the Supremacy Clause issue by the three-judge court, and compel it to decide the case on constitutional grounds. Such a result would contravene the Supreme Court's clearly enunciated policy that, where possible, courts should resolve controversies on nonconstitutional grounds. E. g., Rosado v. Wyman, 1970, 397 U.S. 397, 402, 90 S.Ct. 1207, 1212, 25 L.Ed.2d 442, 450; Hagans v. Lavine, 1974, 415 U.S. 528, 547, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577, 594. Thus, the court concluded, a remand to the district court with directions to convene a three-judge panel was the only disposition consonant with sound judicial policy.

Yet because its decision was bottomed on considerations of judicial administration, the court of appeals limited its holding in *Murrow* so as not to include cases involving coincident statutory and constitutional claims in which the district court found the statutory claim to be meritorious:

> [I]t is improper for a single district judge to decide a supremacy clause claim *against the claimant* when it is pendent to a constitutional claim which must be decided by a three-judge district court. If he is not going to sustain the supremacy claim he should request the convening of a three-judge court and permit that court to pass upon the entire case.

502 F.2d at 1070 [emphasis added]. The rationale of this distinction is not complex. Should the district court hold *in*

it is not constitutionally grounded. See Hagans v. Lavine, 1974, 415 U.S. 528, 533, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577, 585-586.

8. The court viewed the statutory determination as an interlocutory appeal from the denial of an injunction and asserted it had jurisdiction under 28 U.S.C. § 1292(a)(1). The Fourth Circuit has suggested a similar approach, at least where the district court certified the interlocutory matter, Doe v. Lukhard, supra note 4, 493 F.2d at 59 n. 6.

favor of the claimants on statutory grounds, the judgment may be appealed and affirmed on that basis, avoiding decision on the constitutional issue and, hence, the need for a three-judge court. A ruling *adverse* to the plaintiffs on the statutory ground by the single district judge, however, insures that the three-judge court which must be convened to consider the constitutional contention will be bound by the single judge's decision on the statutory issue and will be forced to reach and decide the constitutional claim. Thus, in order to preserve the three-judge court's flexibility to reach a nonconstitutional result, a single district judge inclined to rule against the claimants ought not to rule at all. Much the same reasoning appears in dictum in a recent decision of the Fourth Circuit Court of Appeals, Doe v. Lukhard, 4 Cir. 1974, 493 F.2d 54, 59–60, petition for cert. filed, 42 U.S.L.W. 3667 (U.S. May 24, 1974) [No. 73–1708]. Although the court there upheld on statutory grounds the district court's grant of AFDC benefits to unborn children, it intimated that the entire controversy, in both its constitutional and statutory incarnations, would better have been referred to a three-court initially.[9] What we must decide, then, is whether the interests of "sound judicial administration" require a remand of either of the cases on appeal here.

We do believe that the *Murrow-Doe* reasoning is not applicable to our controversy, and decline to follow it. This conclusion is a function of the strikingly different posture of the cases before us on appeal, since neither district court here reached any constitutional issue which could have required adjudication by a three-judge court. Thus we need not rest our affirmance of *Harris* or our reversal of *Parks* on constitutional grounds. In *Murrow*, the district court had reached and

9. The Fourth Circuit's admonition is a bit broader than the Third Circuit's, perhaps because only the latter court had the benefit of the Supreme Court's reaffirmation in Hagans v. Lavine, supra note 7, of the court's traditionally "constructive view of the three-judge court jurisdiction". 415 U.S. at 544, 94 S.Ct. at 1382, 39 L.Ed.2d at 591.

decided the plaintiff's request to enjoin a state practice on the basis of a constitutional contention which it was clearly without power to reach. In this setting, remand and convocation of a three-judge court were believed to be mandatory by the court of appeals majority, for consideration of the constitutional issue, if no other. To move from this position to one holding that the three-judge court ought to be able to decide both the statutory and constitutional claims was a very short step for the court.

[3] Our cases present a far different situation, however. In *Harris*, the plaintiffs advanced no constitutional challenge at all, and in *Parks*, the parties considered the equal protection contention to be insubstantial for purposes of requiring a three-judge court. Although this conclusion is questionable in light of our holding that the rights involved here are those of the expectant mother rather than the unborn child, and the liberal substantiality test set out in Goosby v. Osser, 1973, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 and Hagans v. Lavine, supra,[10] it did insure that the constitutional claim was not

10. As the Court explained in *Goosby*:

Title 28 U.S.C. § 2281 [28 U.S.C.S. § 2281] does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," Bailey v. Patterson, 369 U.S., [31] at 33, [82 S.Ct. 549, at 551] 7 L.Ed.2d 512; "wholly insubstantial," ibid.; "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910); and "obviously without merit," Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281 [28 U.S.C.S. § 2281]. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Ex parte Poresky, supra, at 32, [54 S.Ct. 3 at 4], 78 L.Ed. 152, quoting from Hannis Distilling Co.

considered by the district court. Since we reverse the district court's statutory decision and find for the plaintiffs without reaching the constitutional question, no claim requiring adjudication by a three-judge court, and direct appellate review by the Supreme Court need be decided. Accordingly, no remand is in order.

Moreover, remand for convocation of a three-judge court here would in no way serve the interests of sound judicial administration which so concerned the *Murrow* majority. Only *Parks* involved a constitutional question and only *Parks* could be remanded, since *Harris*, which involved no constitutional issue, is plainly properly here on appeal. Thus it is our duty to decide it. To remand *Parks* with directions to request the convening of a three-judge court, while affirming *Harris*, would place us in the anomalous position of ordering that a three-judge court be convened to consider the constitutional issue in the face of binding precedent that the controversy can be resolved on a statutory basis. Such a result would pervert the intent of the three-judge court statutes and flout the very values *Murrow* espouses.

II.

We now turn to the merits of the controversy, and necessarily, to the AFDC program itself. AFDC originated as "Aid to Dependent Children", one of three major categorical assistance plans provided for by the Social Security Act of 1935.[11] Although administered by each participating state, the program is largely financed by the federal government, on a

v. Baltimore, supra, 216 U.S. at 288, [30 S.Ct. 326, at 327], 54 L.Ed. 482; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105–106, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933); McGilvra v. Ross, 215 U.S. 70, 80, 30 S.Ct. 27, 31, 54 L.Ed. 95 (1909).

11. Today there are four. In addition to the AFDC, HEW administers Old Age Assistance (42 U.S.C. §§ 301–306), Aid to the Blind (42 U.S.C. §§ 1201–1206), and Aid for the Permanently and Totally Disabled (42 U.S.C. §§ 1351–1355). See Rosado v. Wyman, 1970, 397 U.S. 397, 408 n. 10, 90 S.Ct. 1207, 1215, 25 L.Ed.2d 442, 453.

matching fund basis. State participation in the program is essentially voluntary, but states which do elect to take part are required to submit an AFDC plan to HEW, for approval by the Secretary. So long as the state plans meet the requirements of the Act, the states have considerable latitude in setting the "standard of need" to be employed in determining eligibility for benefits, and the level of benefits paid to eligible individuals. Thus state-mandated dollar ceilings, percentage reductions in benefits, and similar elements are permissible under the Act and under HEW guidelines.[12] See, e. g., Hagans v. Lavine, 415 U.S. at 530, 94 S.Ct. at 1375–1376 n. 1, 39 L.Ed.2d at 583–584; Rosado v. Wyman, 397 U.S. at 407–408, 90 S.Ct. at 1215–1216, 25 L.Ed.2d at 453.

[4] What a state may not do however, is to deny benefits to an entire class of individuals eligible under the Act. See 42 U.S.C. § 602(a)(10); King v. Smith, 392 U.S. at 333, 88 S.Ct. at 2141, 20 L.Ed.2d at 1134. Yet this is precisely the deprivation alleged by each of the plaintiffs in her complaint before the district court. Both Harris and Parks argue on behalf of their respective classes that an unborn child is a "dependent child" within the meaning of Section 406(a) of the Act (42 U.S.C. § 606(a)), and that expectant mothers are therefore "eligible" individuals who may not be denied benefits under the Act. The states, citing HEW regulations, rejoin that although federal monies are made available for the payment of AFDC benefits with respect to unborn children, the unborn child aspect of the program is not a requirement but an option, enforceable only in those nineteen jurisdictions which have elected to exercise it. To resolve the controversy we look first to the Act itself, and then to three Supreme Court decisions for aid to our statutory reading.

12. The history and structure of the AFDC program have been summarized elsewhere. See, e. g., Hagans v. Lavine, supra note 7; Rosado v. Wyman, supra note 11; King v. Smith, supra note 2.

[5, 6] There are two key sections to which the plaintiffs pinion their arguments. The first, Section 402(a)(10) of the Act, 42 U.S.C. § 602(a)(10) provides:

> a) A State plan for aid and services to needy families with children *must* . . .
>
> . . . . . .
>
> (10) *provide*, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and *that aid to families* with dependent children shall be furnished *with reasonable promptness to all eligible individuals.*

Failure to comply with this section of the Act will render a state ineligible to participate in the program, thus barring it from the receipt of matching federal funds. See 42 U.S.C. § 604(a). Moreover, state regulations contrary to the Act's provision are invalid under the Supremacy Clause.[13] Wisdom v. Norton, D.Conn.1974, 372 F.Supp. 1190, 1192. It is apparent then, that if unborn children or their mothers are "eligible individuals" within this section, a participating state may not deny them AFDC benefits. To determine the eligibility of the unborn and their mothers, however, we again look to the Act, since it is undisputed that federal, rather than state standards determine eligibility. See, e. g., King v. Smith, 392 U.S. at 317, 88 S.Ct. 2128; Lopez v. Vowell, 5 Cir. 1973, 471 F.2d 690, 693. Since payments are authorized only with respect to "needy dependent children and the parents or relatives with whom they are living," 42 U.S.C. § 601, this translates into an

13. Article VI, Clause 2, of the Constitution provides:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

inquiry whether an unborn child is a "dependent child" for AFDC purposes.

On its face, however, the Act does not appear to be helpful. Section 406(a) provides:

> When used in this part—
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

One district court has read this language as "clear on its face" and held that it excludes fetuses.[14] Like most courts which have considered the section,[15] we do not believe this definition resolves the issue. A "fetus" *could* of course be "needy", could be deprived of parental—or more specifically, paternal—support, and is obviously "under the age of eighteen." Unfortunately, as all parties here admit, the legislative history is opaque. No Congressional intent to include or exclude the unborn is apparent.[16] Lacking legislative guidance, the par-

14. Mixon v. Keller, supra note 4, 372 F.Supp. at 51, 54.

15. See, e. g., Alcala v. Burns, supra note 4, 362 F.Supp. at 184; Carver v. Hooker, supra note 4, 369 F.Supp. at 212.

16. Although in the course of debate on the original Act at least one representative made an oblique reference to the desirability of protecting children "from the time of birth", we agree with Chief Judge Coffin, writing for the First Circuit, that there is no evidence

ties here turn to their dictionaries, citing contrary definitions of "child" and the axiom of statutory construction that words should be given their commonly understood meaning." Yet such arguments only reinforce the conviction that the term "child" can be defined either to include or to exclude the unborn. Conceding a dearth of guidance from legislative history, logic, or lexicon, the defendants would have us deny AFDC benefits to these plaintiffs, because we can discern no congressional intent to *include* them. The Supreme Court, however, has delineated a different test for construing the AFDC provisions, and in applying it, we conclude that the plaintiff must prevail.

III.

A proper vantage for viewing the contentions here can only be had from atop a tripod of Supreme Court decisions: King v. Smith, 1968, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; Townsend v. Swank, 1971, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 and Carleson v. Remillard, 1972, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352. In each of these cases, a state attempt to limit or preclude the payment of benefits to an individual otherwise eligible under the Social Security Act, was struck down as inconsistent with the Act's provisions, and hence invalid under the Supremacy Clause. In *King*, the

to suggest that Congress as a whole enacted the legislation with any such intent. Carver v. Hooker, 1 Cir. 1974, 501 F.2d 1244 [No. 74–1079], quoting 79 Cong.Rec. 7839 (1935) (Statement of Mr. Ellenhogen).

17. Thus Parks cites Webster's Seventh New Collegiate Dictionary which gives as the first definition of "child", "an unborn or recently born human being". The State of Georgia in its brief insists that it is the second definition of "child" in Webster's New International Dictionary, Second Edition, which is appropriate:

"(2) a young person of either sex . . . . ." And, at oral argument, the Attorney General of Mississippi cited yet another "old dictionary" in his office as defining "child" in a manner so as to exclude fetuses. Such a definitional duel proves nothing, of course, save that either side can find some support for its position in "common usage."

Court invalidated an Alabama regulation which denied AFDC benefits to otherwise eligible dependent children whose mothers "cohabited" with any able-bodied man. Such a policy, the Court held, is in conflict with 42 U.S.C. § 606(a). In *Townsend* an Illinois plan denying benefits to needy children eighteen to twenty-one years of age who attended college, but granting funds to children of the same age attending high school or vocational school, was struck down as violative of Section 406(a)(2)(B) of the Act. 42 U.S.C. § 606(a)(2)(B). In *Carleson*, the last leg of the tripod, the Supreme Court held that California's attempt to deny AFDC benefits to "military enlistees" under the "continued absence from the home" provision of 42 U.S.C. § 602(a) was in conflict with that section and consequently invalid.

More important than the individual state regulations struck down, however, is the common rationale running through all three cases, a principle of construction for the AFDC provisions which has become known as the *King-Townsend* test:

> Thus, King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance, under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that HEW regulations seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished "to *all eligible* individuals."

Townsend v. Swank, 404 U.S. at 286, 92 S.Ct. at 505 (footnotes omitted) (emphasis in Townsend). The Supreme Court has, therefore, established a two-step standard by which any state exclusion may be judged. First, looking to the Act

itself, we must decide whether the statutory language furnishes a basis for eligibility. Second, if facial eligibility is established, we must examine the statute itself and plumb its legislative history, to determine whether Congress intended to exclude the class to which the state would deny benefits. If no Congressional authorization for exclusion can be found, the state standard is in conflict with the Act, and is invalid under the Supremacy Clause. We do not understand the defendants here to argue that the statute or its legislative history evidences any Congressional intent to exclude the unborn. Our research has disclosed none." Thus the single issue for resolution may be simply put: Is an unborn child an "eligible individual" under the Social Security Act?

Answering this question might at first be thought to return to our earlier definitional dilemma. We need not re-address that conundrum ever, since HEW itself, through one of its regulations permits payments of AFDC benefits to expectant mothers "with respect to an unborn child when the fact of pregnancy has been established by medical diagnosis." [19] 45

18. See note 16.

19. Section 233.90(c)(2) provides:

(2) Federal financial participation is available in:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC; and

(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

(3) Federal financial participation (at the 50 percent rate) is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of incapacity of a parent or

CFR § 233-90(c)(2)(ii). Such payments have been authorized since at least 1946 when the Public Assistance Administration, HEW's predecessor agency, altered its "Handbook" to permit Wisconsin to secure matching funds for AFDC payments to expectant mothers. Handbook of Public Assistance Administration, Part IV, Section 3412 (1946).[20] The plaintiffs argue that the impact of such a regulation is obvious. By authorizing payment of AFDC funds to expectant mothers with respect to their unborn children, HEW has necessarily, if tacitly, recognized that an "unborn child" is a "dependent child" within the Act, and hence "eligible" under federal standards for AFDC benefits. When read in light of the "venerable principle" that great weight should be given the construction of a statute by those charged with its administration, Red Lion Broadcasting Co. v. F.C.C., 1969, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371, 384, the plaintiffs conclude, the HEW regulation resolves the "eligibility" portion of the King-Townsend test in favor of the plaintiffs.

The defendants, and HEW itself,[21] however, resist this reading of the regulation and its impact on the statute. They contend, in an argument found persuasive by the District Court in Parks v. Harden, 354 F.Supp. at 623, that there is a distinction in the regulations themselves, which makes § 233.-90(c)(2)(ii) clearly optional. Section 233.90(c) entitled "Federal Financial Participation" is divided into two subjects. The first, Section 233.90(c)(i), discusses various terms which appear in section 406(a) of the Act, 42 U.S.C. § 606(a). Although the HEW brief is less than clear on the point, at least Georgia concedes that any state plan which sought to alter these

pregnancy of a mother. [36 FR 3868, Feb. 27, 1971; 38 FR 26916, Sept. 27, 1973].

20. A more detailed discussion of the origin of the authorization of payments with respect to the unborn may be found in Doe v. Lukhard, supra note 4, 363 F.Supp. at 829.

21. HEW's views were expressed in an amicus brief submitted to the district court in Wilson v. Weaver, supra note 4, and adopted in a letter to this panel.

"interpretations" of § 406(a)'s standards for eligibility would be invalid. See Parks v. Harden, 354 F.Supp. at 623. Section 233.90(c)(2), however, in the words of the brief for the State of Georgia contains "optional provision[s] . . . which also permit payment to persons *not otherwise eligible under the AFDC program*[s] for purposes which HEW has determined to be compatible with the overall purposes of the Social Security Act." (Emphasis in brief). Thus through Section 290.-33(c)(2)(ii), HEW extends AFDC benefits to unborn children and expectant mothers at the option of each state despite the fact that they are ineligible under the Act. Bolstering this assertion of non-eligibility, the defendants stress that it is in Title V of the Act, 42 U.S.C. §§ 701–715 which deals with maternal and child health, rather than in Title IV, Part A, 42 U.S.C. §§ 601–610, the AFDC provision, that Congress expressed its concern for proper prenatal and infant care. Since expectant mothers and unborn children are provided for in Title V, they argue, they are not included in Title IV. Moreover, many of the AFDC provisions in the Act only make sense if applied to postpartum children.[22] Thus, they conclude, neither a fair reading of the Act nor of the HEW regulations can prompt fetal eligibility, so the search for a congressional "intent to exclude" mandated by *King-Townsend*, and Carleson need never be undertaken.

[7] We are compelled to disagree. To answer the last contentions first, it scarcely need be said that the attention Congress has given to mothers and children in Title V of the Act necessarily shows no purpose to ignore them in Title IV. Moreover, the fact that certain of the Act's provisions can sensibly be applied only to a child who is born does not necessarily exclude the unborn from the Act's ambit. And, most importantly, HEW's contention that its regulation authorizes optional payment to "technically ineligible" recipients cannot withstand close scrutiny. Either unborn children are eligible or they are not. If they are eligible, HEW has acted

22. See, e. g., 42 U.S.C. §§ 602(a)(7), (8), (11), (13), (15), (16).

properly in permitting payments with respect to the unborn and under the *King-Townsend* standard no state may declare expectant mothers and their fetuses ineligible. If this class is *in*eligible, however, then HEW has no power to *allow* the benefits, and in doing so, it has acted *ultra vires*. This is the difficulty with the defendants' reading of the Act and regulation. The Act may not be rigid, but it is *not* so elastic that HEW can stretch its language to cover individuals not intended by Congress to be eligible.

We hold that HEW has recognized that the unborn are eligible and that such a determination is a reasonable construction of the Act. This is so for several reasons. First, payments to expectant mothers are consistent with the purposes of the Act to encourage[]

> the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .

42 U.S.C. § 601. It cannot be doubted that proper prenatal care is vital to the physical and mental health of the child, and an unborn child deprived of such care may reasonably be said to be as "needy" and "dependent" as a child born into similar circumstances.[23] Moreover, Congress appears to have recognized the status of the fetus as at least apparently eligible for benefits. During the second session of the Ninety-Second Congress, resolutions were introduced in both Houses proposing that the AFDC provisions of the Act be amended so as to

23. Several district courts agree. E. g., Green v. Stanton, supra note 4, 364 F.Supp. at 126; Stuart v. Canary, 367 F.Supp. at 1346; Parks v. Harden, 364 F.Supp. at 622, 626.

specifically exclude the unborn. See H.R.Rep. No. 92-231, 92nd Cong., 2d Sess. 184 (1972); S.Rep. No. 92-1230, 92nd Cong. Sess. 108 (1972), U.S.Code Cong. & Admin.News, p. 4989. Both resolutions were defeated. Although some courts have read the rejection of these amendments as sanctioning the current HEW practice of making benefits to expectant mothers optional,[24] we, like our First Circuit brothers, believe that Congressional consideration of these measures at minimum establishes its belief that unborn children are currently eligible under the Act "and that only by amending its language can their status as eligible individuals be altered."[25] See Carver v. Hooker, 501 F.2d 1244; Wilson v. Weaver, 358 F.Supp. at 1155.

Finally, our conviction that the Act's purpose and recent legislative history establish fetal eligibility is not undercut by our obligation to defer to the construction given the Act by HEW, the agency charged with its administration. Although HEW interprets the Act as allowing "optional" payments with respect to the unborn, "the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to all eligible individuals'." (Emphasis by the Court in *Townsend*.) Townsend v. Swank, 404 U.S. at 286, 92 S.Ct. at 505, 30 L.Ed.2d at 453.

[8, 9] In sum, then, we conclude that the *King-Townsend* test must be applied, as the court properly did in *Harris*, and failed to do in *Parks*. Since we do not believe that HEW acted *ultra vires* in permitting AFDC benefits to be paid to expectant mothers, we hold that unborn children are eligible individuals under the Act as HEW's payment of funds in their behalf recognizes. 45 C.F.R. § 233.90(c)(2)(ii). This clears the

24. See, e. g., Mixon v. Keller, supra note 4, 372 F.Supp. at 55; Whitfield v. Minter, 368 F.Supp. at 803.

25. See Stuart v. Canary, supra note 4, 367 F.Supp. at 1344; Wilson v. Weaver, 358 F.Supp. at 1155.

first hurdle of the *King-Townsend* standard and since it is patent that there is no evidence that Congress intended to exclude the unborn, the second is cleared as well. Thus, the practices of the states of Georgia and Mississippi denying AFDC benefit to expectant mothers strictly on the basis of the fetal status of their children contravenes the Social Security Act of 1935, and is therefore violative of the Supremacy Clause of the United States Constitution.

For these reasons, the judgment of the district court in No. 73–1855, Parks v. Harden, is reversed and that in No. 73–3220, Harris v. Mississippi is affirmed.

AINSWORTH, Circuit Judge (dissenting):

Regretfully, I must dissent though I am aware that the majority opinion follows the weight of authority in other circuits. The majority arrives at a socially attractive conclusion, but it is a conclusion which the Congress and state legislatures should more properly reach. In pursuing what seems just, the majority not only unduly legislates by judicial fiat but also encumbers state and federal governments with difficult and complex burdens.

Initially, I express my agreement with the majority's conclusion that Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973), and Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1381–1382, 39 L.Ed.2d 577 (1974), allowed the district court in *Parks* to exercise pendent jurisdiction over the statutory claim, related as it was to the equal protection issue. *See also* Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 1351 n. 1, 39 L.Ed.2d 662 (1974). It appears, however, that while the equal protection claim was not "wholly insubstantial," it had little prospect of ultimate success. *Cf.* Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). Though it cannot be said that the district court abused its discretion in recognizing and adjudicating the pendent statutory claim, as a matter of sound judicial policy courts might decline to hear matters the sole jurisdictional basis for which

is a constitutional claim of dubious merit. *Cf.* Hagans v. Lavine, supra, 415 U.S. at 550, 94 S.Ct. at 1386 (Powell, J., dissenting).[1]

In its discussion of the merits, the majority gives little deference to HEW's basis for and interpretation of its own regulation, 45 C.F.R. § 233.90(c)(2)(ii), by which the extension of AFDC payments to expectant mothers is made optional for states participating in the program. The majority concedes that the statutory terms themselves provide little interpretative assistance, and that the legislative history is even less helpful. In such circumstances, HEW's interpretation should

1. In its opinion, *ante* p. 1391, the majority opinion states that *Harris* is "plainly properly here on appeal." I am not as certain. Plaintiff asserted, and the district court accepted, jurisdiction based only on a statutory claim under the Social Security Act, urging that 42 U.S.C. § 1983 states a federal cause of action and that 28 U.S.C. § 1343 provides jurisdiction. Recent opinions indicate that the latter conclusion may be erroneous. As Judge Friendly has stated, "The Social Security Act is not an 'Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States,' 28 U.S.C. § 1343(3), so as to remove the jurisdictional amount requirement for the statutory claims." Aguayo v. Richardson, 2 Cir., 1973, 473 F.2d 1090, 1101, cert. denied, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974). For other holdings that sections 1343(3) and (4) do not confer federal courts with jurisdiction over statutory claims not involving personal liberties or civil rights, see Lopez v. Luginbill, 10 Cir., 1973, 483 F.2d 456, 488–489, cert. denied, 415 U.S. 927, 94 S.Ct. 1436, 39 L.Ed.2d 485 (1974); McCall v. Shapiro, 2 Cir., 1969, 416 F.2d 246, 249–250; *see also* Note, Federal Jurisdiction over Challenges to State Welfare Programs, 72 Colum.L.Rev. 1404, 1421–1428 (1972). Since less than $10,000 is in controversy, we likewise do not have federal question jurisdiction under 28 U.S.C. § 1331(a). The Supreme Court has acknowledged that the question whether a statutory claim under the Social Security Act can derive jurisdiction from section 1343 is as yet unresolved. Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974); *see* Rosado v. Wyman, 397 U.S. 397, 405 n. 7, 90 S.Ct. 1207, 1214 n. 7, 25 L.Ed.2d 442 (1970); *cf.* Doe v. Lukhard, 4 Cir., 1974, 493 F.2d 54, 56–57, petition for cert. filed, 42 U.S.L.W. 3667 (May 24, 1974) [No. 73-1763]. Thus, it is at least uncertain whether *Harris* is properly before us. In view of the majority's disposition of *Parks*, however, which is properly here, it is not necessary to decide this difficult but important jurisdictional issue. Nor is it necessary to dismiss *Harris*, for plaintiffs could

be given considerable deference. As the Supreme Court said of HEW regulations relating to the AFDC program,

> [HEW's construction] is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers.

Rosado v. Wyman, 397 U.S. 397, 415, 90 S.Ct. 1207, 1219, 25 L.Ed.2d 442 (1970). Moreover, HEW's position that grants to expectant mothers are not mandatory *has been consistent and unchallenged for some 30 years.* In such cases of long-standing construction of a statute by those charged with its administration, the agency's construction should be followed "unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969); *see* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972); Zemel v. Rusk, 381 U.S. 1, 11–12, 85 S.Ct. 1271, 1278, 14 L.Ed.2d 179 (1965); Udall v. Tallman, 380 U.S. 1, 16–18, 85 S.Ct. 792, 801-802, 13 L.Ed.2d 616 (1965). We have no compelling indications that HEW's position here is wrong.[2]

merely bring the same suit, appended to a colorable equal protection claim as in *Parks*, and prevail on the merits on the basis of *Parks*.

2. The majority recognizes that HEW's interpretation of the Social Security Act is due great deference. *Ante*, p. 1402. Indeed, in the absence of other sources of guidance, the majority relies almost exclusively on HEW's regulations. Inexplicably, however, that reliance does not extend to HEW's long-held interpretation that the Act permits, as its regulation provides, optional funding for non-mandatory programs giving aid to unborn children and their mothers.

Deferring to HEW on the question whether the Act contemplates optional aid does not run afoul of the Supreme Court's command that "the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to all eligible individuals'." Townsend v. Swank, 404 U.S. at 286, 92 S.Ct. at 505. If the regulations were read as properly providing optional aid to individuals not technically eligible for AFDC assistance, no "eligible individuals" under the Act would be denied benefits. The majority may properly assert that the agency's interpretation disregards the holding in *Townsend* only by first declining to defer to HEW on the issue of whether optional aid is permissible under the Act. Having

The majority opinion does not reach the difficult question whether the unborn are children within the meaning of the Social Security Act. Since my disagreement is with the majority's interpretation of the regulation in question, it is unnecessary in this dissent to reach the complex issue of whether a fetus is a "child."

HEW's own regulation is the basic support for the majority's conclusion that the unborn are eligible beneficiaries of AFDC payments. The optional grants to the unborn, it is reasoned, are either grants to "eligible individuals" and thus mandatory under the *King-Townsend-Carleson* troika, or they are grants to ineligible individuals and thus illegal and *ultra vires*. The trap is both seductive and logical, but not unavoidable. An examination of the regulations in question will show that HEW's position[3] is neither mandated by nor inconsistent with the Social Security Act. If this is so, the states and HEW are not obligated to extend AFDC payments for the benefit of the unborn.

The regulation in question is analogous to other provisions by which HEW makes funding available to states under the AFDC program on a non-mandatory basis. HEW has promulgated four different provisions under 45 C.F.R. § 233.90(c)(2) which make payments optionally available in instances where technical eligibility is not present. Under section 233.-

thus narrowed the inquiry, the majority then "defers" to what it sees as HEW's interpretation of what is mandatory under the Act—despite the fact that HEW insists its regulation is not designed to explain what is mandatory under the Act. *See* note 7, *infra*. Either the agency's interpretation is to be respected or it is not. The bitter must be taken with the sweet.

3. As both the majority opinion and this dissent indicate, the Department of Health, Education and Welfare will be directly affected by the decision of the Court. The agency's practice over a long period of time and its view of its own regulation are of great importance. HEW was not a party in this case, however, nor did it appear before the Court. We were made aware of HEW's position by the submission to us of its *amicus curiae* brief in Wilson v. Weaver, N.D.Ill. 1972, 358 F.Supp. 1147, aff'd, 7 Cir., 1974, 490 F.2d 155.

90(c)(2)(i),[4] AFDC payments can be made to an eligible relative up to 30 days before the child is placed in the care of that relative. Since at the time a relative receives such payments he is not caring for a "dependent child," the payments are obviously beyond the statutory parameters. Just as obviously, however, such payments will enable the relative to purchase necessary food, clothing, toys and household items so that when the child does come into the relative's custody, proper care can begin immediately. Under section 233.90(c)(2)(iii),[5] a relative can receive payments for an entire month, even if the child leaves the eligible family situation sometime during the same month. Again, technical eligibility may be lost with the child's departure, but not absent are the obligations to pay for major expenses, such as rent and furniture, incurred in part for the child's benefit. In addition, the regulation avoids administrative problems inherent in attempting to allocate payments for less than a month. Section 233.90(c)(2)(iv)[6] allows payments to be made to persons who are not eligible relatives or caretakers specified in 42

4. 45 C.F.R. § 233.90(c)(2)(i) provides:
(2) Federal participation is available in:
(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC . . . .

5. 45 C.F.R. § 233.90(c)(2)(iii) provides:
(2) Federal participation is available in:
. . . . . .
(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC . . . . .

6. 45 C.F.R. § 233.90(c)(2)(iv) provides:
(2) Federal participation is available in:
. . . . . .
(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he had been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

U.S.C. § 606(a), but who are providing temporary care to a child in emergency situations while other plans are being made for the child's care and support. Providing assistance to a technically ineligible person, consistent with the purposes of AFDC benefits, could not be more manifest.

In this context, the rationale of providing optional funding for payments to pregnant women allowed by section 233.90(c)(2)(ii), the regulation involved in this case, becomes more clear. By providing payments to women before the child is born, states can more effectively guarantee the provision of needed assistance immediately to post-partum children, those children who are clearly eligible for assistance under the Act. The other provisions allowing optional payments, sections 233.90(c)(2)(i), (iii) and (iv), are not statements that certain classes are "eligible individuals" under the Act; the fact of ineligibility is quite clear. Similarly, the optional extension in this case of "payments with respect to an unborn child" is not a determination that the unborn are "eligible individuals," and should not in fairness be so construed. The payments authorized by sections 233.90(c)(2)(i) through (iv) are justifiable because of their close and direct relationship to circumstances in which individuals will soon qualify for AFDC payments and will then be entitled to receive assistance under the Act. Moreover, the provisions for optional assistance are totally consistent with the statutory purpose of the AFDC program, even though such assistance is not specifically contemplated by the language of the statute. These regulations, which are well-considered and beneficial provisions, are valid under 42 U.S.C. § 1302, which gives the Secretary of Health, Education and Welfare the power to "make and publish such rules and regulations, not inconsistent with this chapter [which includes the Social Security Act], as may be necessary to the efficient administration of the functions with which [he] is charged . . . ." The regulation in this case thus does not have to be regarded either as a statement that the unborn are "eligible individuals" under the Act or as a provision that is illegal

and *ultra vires*. Rather, the provision can be accepted for what it is: an attempt to aid those not otherwise eligible for AFDC payments in order to assure more effective assistance to those who *are* eligible. Thus there is no proper basis for the majority's contention that HEW has indirectly declared the unborn to be "eligible individuals" properly the beneficiaries of AFDC payments.[7]

Viewed in the context of HEW's purpose in promulgating the regulation in question, HEW's conclusion that the unborn are not mandatorily eligible AFDC recipients is both logical and plausible. Nonetheless, the majority relies on this regulation, and this reliance is the basic support for a result which, it is conceded, cannot be derived from the legislative history or

7. HEW's position on the relationship between the existence of its regulation permitting optional assistance to the unborn and the majority's conclusion that the regulation implicitly means the unborn are "eligible individuals" within the meaning of the Social Security Act is set forth in HEW's *amicus* brief in Wilson v. Weaver, *supra*, as follows:

> Subdivision (ii) [45 C.F.R. § 233.90(c)(2)(ii)], relating to the unborn child, is of a piece with the rest of section 233.90(c)(2). When a child is expected but not yet born, and on the child's birth the statutory definition of "dependent child" will be met, federal financial participation is available, at state option, in anticipation of the birth of the child. The situation is an extension of that in subdivision (i), where a child is coming to live with a specified relative within 30 days. In addition to the prospective need for furnishings, layette and other items for the unborn child, the meeting of the mother's subsistence and health needs during pregnancy and at the time of birth may have a close relationship to the situation of the mother and child upon birth. . . .
>
> In this context, therefore, the availability of federal financial participation in respect to an unborn child *depends on the exercise of federal regulatory authority*, in relation to state-administered or supervised programs which vary from state to state, that gives options to the states, which the vast majority of the states have not chosen to exercise, to obtain federal matching for payments in certain limited and time-related situations where, however, the statutory definitions are not met at the time of payment. *But, in our view, neither the statute nor the regulations contemplate the imposition of mandatory coverage of unborn children upon the majority of the states which do not cover such children.*

HEW brief, *supra* note 3, at 15–16 (emphasis added).

indicia of congressional intent.[8] The reasonableness of the long-standing regulation and HEW's interpretation thereof, combined with the total lack of compelling reasons for ignoring this rational position, seem to me to magnify the error.

Two further points need brief statement. First, the majority's approach will unduly limit flexibility in the administration of the AFDC program. This program has been described by the Supreme Court as a "scheme of cooperative federalism." *E. g.*, King v. Smith, 392 U.S. 309, 316, 88 S.Ct. 2128, 2133, 20 L.Ed.2d 1118 (1968); Jefferson v. Hackney, 406 U.S. 535, 542, 92 S.Ct. 1724, 1729, 32 L.Ed.2d 285 (1972). The majority rationale, if logically followed, would cause the presently optional aid provisions in 45 C.F.R. §§ 233.90(c)(2)(i), (iii) and (iv), to which we have already adverted, to be declared either mandatory on the states or *ultra vires*. Not only would such a result be unfortunately erroneous, but it would harm the flexibility in the working relationship of the states and HEW, and impede new attempts to facilitate the delivery of assistance to those eligible for AFDC payments.

Finally, the majority's conclusion will present intricate and complex administrative problems to the states. The decision

8. The majority suggests by its statement that Congress "defeated" resolutions which would specifically exclude the unborn, that Congress has recognized the eligibility of the unborn. What in fact happened was that the House of Representatives passed an amendment "to *make clear* that an unborn child would not be included in the definition of a child." H.R.Rep. No. 92-231, 92d Cong., 2d Sess. 184 (1972), U.S.Code Cong. & Admin.News, p. 5170. The Senate Report approved and the Senate passed the same amendment, quoting with approval the House Report's language. S.Rep. No. 92-1230, 92d Cong., 2d Sess. 467 (1972) ("only children who have actually been born" are eligible for AFDC). The provision did not pass, however, as all welfare provisions were "bottled up" by the failure to agree on the Administration's subsequently abandoned Family Assistance Program. If any inference can properly be drawn from this action, it would be that Congress was of the strong opinion that the unborn are presently excluded from AFDC payments, and Congress wanted to correct the actions of HEW and the courts. At any rate, this congressional action does clearly indicate that the majority's decision is totally at odds with what Congress considers sound policy.

will allow a woman verifiably in her first month of pregnancy to begin receiving AFDC payments. But according to the principles in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the same woman, up through the sixth month of pregnancy or until "viability," is entitled to abort the fetus subject only to regulation "reasonably relate[d] to the preservation and protection of maternal health." Roe v. Wade, *supra*, 410 U.S. at 163, 93 S.Ct. at 732. There are logical inconsistencies prevalent in a situation where it is held that Congress was so concerned with the well-being of fetuses that it provided for financial assistance to the unborn, but, notwithstanding such congressional concern, the mother of a fetus can abort her "eligible individual" at her whim. This perplexing paradox is necessarily presented by today's decision, and it should be noted that this situation is brought about solely as the result of judicial decisions. This serves only to reinforce our conclusion that the decision herein to mandate assistance to the unborn is one which should be left to the states of Mississippi and Georgia, or to the Congress of the United States.

I therefore am unable to join the majority opinion and respectfully dissent.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

SUPPLEMENTAL MEMORANDUM: RELATIONSHIPS AMONG POVERTY, PRE-NATAL NUTRITION, AND POST-NATAL DEVELOPMENT AND WELL-BEING.

As noted in the stiuplated testimony of Dr. Roy M. Pitkin (Single Appendix at 13-16), the extent to which a mother's nutritional needs are met during pregnancy is a major determinant of a child's post-natal development -- or even survival. The purpose of this Supplemental Memorandum is to summarize briefly, but more fully than the body of the attached Brief, some of the evidence regarding the relationships among poverty, pre-natal nutrition, and post-natal development. These relationships are significant to the issues in this case inthat they demonstrate that the Petitioners' policy of denying AFDC assistance to children and their mothers during the pre-natal period is totally inconsistent with the paramount purpose of AFDC: the protection of children.

Since what is ultimately involved in this case is financial assistance, it is useful to note at the outset that statistical studies have shown a relationship between pre-natal poverty and post-natal harm to both mothers and children. Thus, for example, the rate of maternal mortality due to toxemia (the most frequent cause of maternal death in the United States) varies considerably with income group.[1] Moreover, pre-natal poverty greatly increases the risk of abnormally low weight at birth -- a crucial determinant of subsequent development

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[1] National Research Council, Maternal Nutrition and Child Health, 130-31 (1950).

(see infra).[2]

Probably the most important way in which pre-natal poverty affects maternal and child welfare is through poor nutrition. A number of studies have confirmed that poor women have nutritionally inadequate diets, even during pregnancy.[3] These studies of course are consistent with common sense: Without financial means, a mother simply cannot obtain a diet that is adequate for the special demands of pregnancy.

Poor nutrition during the pre-natal period poses a number of grave risks to both mother and child, ranging from poor calcification of the bone structure to death. To a substantial extent, poor pre-natal nutrition poses dangers to the child during its post-natal existence because poor pre-natal nutrition is a major determinant of low birth weight.[4] As indicated in the Stipulated Testimony of Dr. Pitkin (Single Appendix at 14-15), birth weight is a major determinant of post-natal survival and development.

One of the most disturbing results of research on the effects of low birth weight on post-natal development has been the linking of low birth weight with mental subnormality and mental retardation.

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[2] U.S. Dept. of Health, Education and Welfare, Public Health Service, Vital Statistics of the United States, 1965, Vol. 2; Silverman and Sinclair, Current Concepts: Infants of Low Birth Weight, 272 New England J. Med. 448 (1966).

[3] Darby, et al., The Vanderbilt Cooperative Study of Maternal and Infant Nutrition, I, II, III, 51 J. Nut. 539 (1953); Jeans, et al., Dietary Habits of Pregnant Women of Low Income in a Rural State, 28 J. Am. Diet Ass. 27 (1952).

[4] See, Committee on Maternal Nutrition of the Food and Nutrition Board, National Research Council, National Academy of Sciences, Maternal Nutrition and the Course of Pregnancy: Summary Report 14 (1970); Smith, Effects of Maternal Undernutrition upon the Newborn Infant in Holland (1940-45), 30 Pediat. 229 (1947).

Low birth weight children are significantly over-represented among the mentally sub-normal late in life. Moreover, when development of the nervous system is impaired at a critical time in utero, full recovery is not possible by later nutritional intervention, no matter how zealous. Among very low birth weight infants, there is an increased incidence of epilepsy, cerebral palsy, and severe mental retardation.[5]

As noted earlier, pre-natal nutrition is a major determinant of survival.[6] Experience in the Soviet Union and the United Kingdom during World War II demonstrated this relationship in a striking manner. During the siege of Leningrad, during which pregnant women were unable to obtain a normal diet, the stillbirth rate doubled.[7] In the United Kingdom, on the other hand, although wartime resulted in an upheaval in general living conditions, unemployment was rare, and a government rationing program gave first priority to pregnant women. The result was that lower class women were actually receiving a better diet during pregnancy than they had received before the war. Significantly, during this wartime period, both the stillbirth and neonatal mortality rates declined significantly, among women whose

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[5] Birch, Functional Effects of Fetal Malnutrition, 134 Hosp. Practice 135-47 (1971) (cited and discussed in Stuart v. Canary, 369 F.Supp. 1343, 1346-47 (N.D. Ohio 1973).

[6] Testimony of Dr. Pitkin, Single Appendix at 14-15; Toverud, The Influence of Nutrition on the Course of Pregnancy, 28 C. Milbank Mem. Fund Quart. 7 (1950); Cameron and Graham, Antenatal Diet and its Influence on Stillbirths and Prematurity, 24 Glasgow Med. J. 1 (1944).

[7] Antanov, Children Born During the Siege of Leningrad in 1942, 30 J. Pediat. 250 (1947).

diets were adequately supplemented during pregnancy.[8]

The evidence regarding the relationship between pre-natal nutrition and post-natal welfare has led the National Research Council to conclude that:

> If a positive result is to be gained in reduction of premature births, attention must be paid to the environmental stresses, as well as to the nutritional status of pregnant women. Social and financial security are of the greatest importance in this connection. The better the care of pregnant women, the lower the stillbirth, premature birth and neonatal mortality rates, and the better the general health of newborn infants.[9]

Poor nutrition poses dangers to the mother as well as to the child. Studies by maternal mortalities committees have indicated that at least half of the maternal mortalities which occur could be prevented by improving diet and medical care.[10] The importance of diet in reducing maternal mortality is shown by the fact that the increase of proteins in the diet during the past fifty years has been the most important factor in reducing the incidence of toxemia.[11]

The preceding material has concentrated on some of the more recent empirical data showing the relationships between poverty, pre-natal nutrition, and child welfare and development. But it is useful to note that these relationships have been known to exist for many years. Thus, in their 1935 review of work on dietary requirements in

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[8] See, Balfour, Supplementary Feeding in Pregnancy, 1 Lancet 208 (1944).

[9] National Research Council, National Academy of Sciences, Maternal Nutrition and Child Health 130-31 (1950).

[10] National Research Council, National Academy of Sciences, Maternal Nutrition and the Course of Pregnancy 184 (1970).

[11] Id. at 176.

pregnancy and lactation, Garry and Steven concluded that

> [i]f the summary table above can be taken as even an approximate indication of the dietary requirements of women in pregnancy and lactation, then Orr's survey of diets in this country shows that a large proportion of women cannot hope to procure a diet adequate for the physiological strain of child-bearing. Any investigation into the causes of maternal morbidity and mortality should therefore take into account the diet of the mothers. Moreover, since the maternal diet in pregnancy and in lactation inevitably affects the wellbeing of the infant, the health of the whole population depends to a greater or less extent on the feeding and nutrition of the mothers.[12]

In 1972, the Subcommittee on Nutrition and Human Needs of the California Senate Committee on Health and Welfare conducted hearings into the effects on child health and development of cutbacks by the California Department of Social Welfare in the amount of AFDC assistance paid to pregnant women (California has for several years been one of the States which has considered pregnant women eligible for AFDC assistance with respect to their unborn children.) An Interim Report concluded that the "nutritional deprivation to the mother and fetus will predictably lead to tragic consequences to thousands of yet unborn children." This interim report stated that those consequences would include:

> A disproportionate number of babies born premature, with low birthweights;
>
> A disproportionate number of stillborn babies;
>
> A disproportionate number of physically and mentally damaged babies suffering lifelong handicaps.[13]

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[12] Garry and Steven, A Review of Recent Work on Dietary Requirements in Pregnancy and Lactation, With an Attempt to Assess Human Requirements, 5 Nutrition Abstracts 855, 882 (1935).

[13] Unborn and Underfed, An Interim Report on the Administration's Cutbacks in AFDC Grants to Pregnant Women on Welfare (submitted by Senator George S. Moscone, Chairman, Subcommittee on Nutrition and Human Needs to the California Senate Committee on Health and Welfare, January, 1973) (reproduced as Addendum C to this Brief, infra).

These conclusions are particularly significant in light of the fact that in California, pregnant women are eligible for AFDC on behalf of their unborn children, so that even with the reductions considered in the Subcommittee's hearings, women in that State would be receiving considerably more AFDC assistance during the pre-natal period than women in States, like Iowa, which do not provide any AFDC assistance during that time.[14]

[14] In light of the estimates by the State of Arizona with regard to the cost of AFDC eligibility for pregnant women, it is also interesting to note that Senator Moscone's Interim Report concluded that California's reduction in pre-natal AFDC assistance would result in increased costs to the state, because of increased hospital care for premature and otherwise abnormal newborns, other long-term medical care beyond infancy, and compensatory educational programs associated with the potential lifelong handicaps resulting from inadequate pre-natal nutrition. Addendum C, infra at c4-c5.

ADDENDUM C

UNBORN AND UNDERFED

An Interim Report on the Administration's Cutbacks In AFDC Grants to Pregnant Women on Welfare

Submitted by

Senator George R. Moscone

Chairman

Subcommittee on Nutrition and Human Needs

to the

Senate Committee on Health and Welfare

January 1973

BACKGROUND

On October 1, 1972 county welfare departments in Los Angeles, Santa Clara, Alameda and other counties throughout the state notified tens of thousands of pregnant women on AFDC that their welfare grants would be cut by as much as $65 per month. The effect of these cutbacks has been to substantially destroy a 23-year-old state policy designed to benefit soon-to-be-born children on AFDC.

Beginning in 1949, administrative policy was established recognizing the unborn child for purposes of AFDC eligibility and grant determination. The principal purpose of the policy, in keeping with changes in federal social security regulations, was apparent: to provide added dollars to the needy family at a critical time in order to maintain and improve the health prospects for the soon-to-be-born child. The wisdom of this policy was underscored by the fact that California's welfare statutes have historically limited welfare grants to substantially less than what those same laws say is necessary to meet the minimum standards of need for a family.

Effective October 1, 1972 SDSW adopted regulations dealing with the issue of "in-kind" income. According to SDSW, the counties are obliged to recognize--and deduct from the grant--all income and resources available to any recipient, including so-called in-kind income. In the example of the expectant mother with no other children, SDSW still recognizes the existence of the unborn child upon verification of pregnancy and accords

the family a grant of $190 per month. But then SDSW asserts that the mother is making an "in-kind" contribution of food, rent, utilities, and clothing to the fetus. According to the new regulations, $65 per month in in-kind income was then to be deducted from the $190 grant, leaving a monthly grant of only $125 as opposed to the $190 required by law.

In the case of a pregnant woman with one other child, the monthly grant was cut from $235 to $200; the grant for a pregnant woman with two other children was cut from $280 to $245, and so forth.

Because of the serious health and nutritional implications posed by these cutbacks, this Subcommittee held a series of four hearings--two in October and two in November--to investigate the impact of these cuts and to affix administrative responsibility for the action taken.

FACTUAL AND LEGAL ISSUES

During one of the Subcommittee's four hearings, SDSW Deputy Director Ronald Zumbrun offered testimony suggesting that no cutbacks had actually taken place. That testimony was misleading and, indeed, false. The facts are these: In the case of a pregnant woman on AFDC expecting her first child, in early 1971 such a family unit would have been entitled to a maximum grant of $140 per month. In June of 1971 that amount was raised to $176 per month as a result of a court ordered cost-of-living adjustment. On October 1, 1971, under the terms of the Welfare Reform Act, the California

Legislature further raised the AFDC grant to an expectant mother with no other children, from $176 per month to $190. In recognition of the general inadequacy of basic AFDC grant levels, the Welfare Reform Act also mandated similar grant increases to pregnant women with children other than the unborn child. Notwithstanding this clear history, on October 1, 1972 the Administration put its in-kind cutback scheme into effect through regulations which cut the grant to a pregnant woman with no other children from $190 per month to $125 per month. These regulations also made similar cutbacks to pregnant women with other children in the household. All this in disregard of the fact that the Welfare Reform Act made no change whatever which could justify any departure from the long-standing policy of providing the full measure of a grant increase upon verification of pregnancy.

During the Subcommittee's third hearing, Social Welfare Director Robert Carleson was asked under what authority in state law he had relied in instituting the so-called in-kind cutbacks. The Director pointed to the Welfare Reform Act generally and specifically alluded to changes in Section 11008 of the Welfare and Institutions Code. In point of fact, no change was made in that section of law--or in any other section of law--which could reasonably be interpreted to authorize a grant cutback to pregnant women on AFDC.

The Director further alluded to his view that there existed a federal mandate to institute the in-kind cutbacks. If such a statutory or regulatory mandate did indeed exist,

then presumably federal authorities would compel similar cutbacks in all states throughout the nation. Yet, this Subcommittee's independent investigation reveals that California is the only state utilizing the in-kind rationale to effectuate grant cutbacks to pregnant women.

Furthermore, a letter to the Director from Philip Schafer, Regional Commissioner of the United States Department of Health, Education and Welfare, strongly indicates HEW's view that the entire in-kind income scheme, as conceived by SDSW, is illegal.

THE HUMAN AND ECONOMIC COSTS

The Subcommittee received uncontroverted testimony from physicians, nutritionists, and other experts pointing to the serious nutritional deprivation which is associated with the AFDC grant cutbacks. The nutritional deprivation to the mother and the fetus will predictably lead to tragic consequences to thousands of yet unborn children. Those consequences will include:

- A disproportionate number of babies born premature, with low birthweights;
- A disproportionate number of stillborn babies;
- A disproportionate number of physically and mentally damaged babies suffering lifelong handicaps.

In addition to the human tragedy involved, the costs of these cutbacks will soon outweigh any savings. Among the costs will be:

- A minimum of $150 - $200 per day for the hospital care of premature and otherwise abnormal newborns;
- Other long-term medical care beyond infancy;
- Thousands of dollars per child for compensatory education programs and other remedial costs associated with lifelong handicaps.

THE DISREGARD OF MEDICAL OPINION:

An abundance of medical opinion, including countless studies, stress the critical importance of nutrition during pregnancy. Not only did top SDSW officials ignore the volumes of information in this area, these same officials apparently contacted no one as to the potential health consequences stemming from AFDC cutbacks to pregnant women.

At the second hearing of the Subcommittee, Dr. Walter Ballard of the Department of Public Health and Dr. Stubblebine, then Director of the Department of Mental Hygiene, testified that their respective agencies were not consulted or in any way contacted regarding their views as to the proposed regulatory cutbacks.

Moreover, the in-kind regulations were apparently drafted in secrecy at SDSW and then promulgated as "emergency regulations," effective immediately, thus cutting off the opportunity for a public hearing prior to their implementation.

It seems clear that top officials at SDSW were determined to pursue the in-kind cutbacks to pregnant women, in disregard of all available expert opinion, and without even affording an opportunity for such opinion to be registered in timely public hearings.

PARTIAL RESTORATION

As might be expected, a growing body of public and professional criticism emerged in the wake of the AFDC cutbacks. With this criticism building, on November 28th, just one day before the Subcommittee's fourth scheduled hearing, Director Carleson adopted an emergency regulation which partially restored the cutbacks. A pregnant woman, expecting her first child on AFDC, would receive a basic grant of $172 per month, rather than the $125 per month under the previous in-kind cutback scheme. Thus, for these families the Director restored $47 to the basic grant. But, this is only $47 of the $65 cutback, leaving a basic grant which is still $18 less than the $190 per month mandated by the Legislature.

Throughout the many weeks of controversy regarding the in-kind cutbacks, top SDSS officials have publicly proclaimed the propriety of the cutbacks and the adequacy of the basic AFDC grant level. Yet, after the cutbacks were in effect two full months, SDSS ordered a restoration of $47 of the $65 per month cutback to a woman expecting her first child. The question now emerges: After cutting the grants precipitously, and then later partially restoring the basic AFDC grant, who in the Administration is now prepared to take responsibility for the damage done during the two months in which the full cutbacks were in effect?

And, who is prepared to accept the responsibility for the

continuing $18 gap between the $190 per month grant required by state law and the $172 grant under the November 28th SDSW regulations?

Finally, who is prepared to accept responsibility for the fact that there has been no reference whatever as to the cutbacks to thousands of pregnant women with other children in the AFDC household?

CONCLUSION:

From the outset, the Administration's in-kind cutbacks to pregnant women have been a cruel and shoddy attempt to effectuate short-run welfare savings without regard to the tragic human consequences.

The conduct of key Administration officials--in SDSW, in the Health and Welfare Agency, and presumably in the Governor's office--has been deplorable. The actions of those officials have been reckless, irresponsible, and destructive of human life.

RECOMMENDATIONS

I. The damage and tragedy inflicted to date cannot be undone. But it can be stopped before it goes further. The Administration can--and must--immediately adopt regulations rescinding the in-kind cutbacks and restoring full benefits to all pregnant women on AFDC.

II. In addition, the Administration should immediately adopt regulations insuring that the $9 special dietary

allowance be automatically granted upon verification of pregnancy and without further eligibility criteria.

III. Finally, the Administration should adopt a procedure by which all decisions which could adversely affect the health and well-being of AFDC recipients be first cleared through the appropriate health officials and experts within the departments of public health and mental hygiene.

George R. Moscone

1d

ADDENDUM D

IV. B. 7. c. (1) Definition of dependent child
x - V. A. 1. a. (3) (a) Use of Federal funds
x - V. E. 2. Audit policies

15:0D

June 25, 1940

Regional Director, Chicago
Attention: Miss Martha F. Phillips,
Public Assistance Representative

Peter Kasius, Associate Director,
Bureau of Public Assistance

Exceptions to Payments on Behalf of Unborn Child -- Wisconsin Aid to Dependent Children Audit for the Period February 1, 1936 to December 31, 1937 -- Your Memorandum of February 21, 1940 and Our Memorandum of April 1, 1940.

No final decision has yet been made with respect to the proposed Wisconsin plan provision of including unborn children in the aid to dependent children program nor with respect to exceptions to payments to unborn children included in the Wisconsin aid to dependent children audit report for the period February 1, 1936 to December 31, 1937, which were appealed by the state in its brief of November 27, 1939.

In our memorandum of April 1, in reply to yours of February 21, "Appeal--Wisconsin Aid to Dependent Children Audit Report--for the period February 1, 1936 to December 31, 1937," we stated:--

> "At present, we are unable to answer the question of whether Federal participation in payments in behalf of unborn children will be allowed. The question has been referred to the Office of the Director of the Bureau for determination, and we shall advise you as soon as a definite policy is established."

* * *

Peter Kasius

ADDENDUM E

May 27, 1940

Peter Kasius, Associate Director,
Bureau of Public Assistance

Division of Standards and Procedures,
Bureau of Public Assistance

Wisconsin--Agenda--Federal Participation in State Payments in Behalf of Unborn Children

Following the conference on May 21 on payment with respect to an unborn child, Mrs. Stanton has reported verbally that a comprehensive search of the files has produced no supporting information on the medical determination of pregnancy. We believe that any statement of policy will need a very careful piece of research and experimentation to establish adequate safeguards for the use of public funds and for recipients of public assistance as well.

For the present, we recommend that payments to an appropriate relative who is otherwise eligible to receive aid to dependent children may include an amount for an unborn child with respect to which the terms of the definition in Section 406 of the Federal Social Security Act may be found presumptively to obtain.

ADDENDUM F

IV. B. 7. c. Definition of dependent child
x - V. A. 1. A.(3)(a) Use of Federal funds

July 3, 1940

Regional Director, Chicago
Attention: Miss Martha E. Phillips,
Public Assistance Representative

Division of Plans and Grants,
Bureau of Public Assistance

Wisconsin--Federal Participation in State Payments in Behalf of Unborn Children

In reply to our memorandum of May 27, 1940, you have indicated that the State agency has no additional plan material to submit with respect to the procedures by which eligibility of an unborn child for assistance payments is determined, as outlined in the State's memorandum of February 9, 1940. As you know, there was an inter-bureau conference on this subject on Tuesday, May 21, 1940, at which time it was decided that a statement of policy would be drafted on this subject for the consideration of the Social Security Board. In this memorandum, however, we are confirming the consensus of the thinking at the conference.

It was the consensus of the conference that legally it was possible to recognize the existence of a child prior to its birth. For purposes of Federal matching, therefore, it is felt that section 406(a) of the Social Security Act governing the age of a dependent child could be interpreted to include a child prior to its birth.

It was pointed out at the meeting that a medical determination of the existence of an unborn child can be made with reasonable accuracy. It was felt that the State agency should claim matching only with respect to those payments where there is available an accurate medical determination as to the existence of the child.

There was some feeling at the conference that the Board should not take the position of promoting this extended interpretation of the Federal act but that there is nothing in the Social Security Act which would prohibit the State from claiming Federal matching in behalf of the unborn child.

The Bureau of Public Assistance is proceeding with the formal statement of policy on this subject, and no action can be taken at this time which would commit the Board to matching of payments in behalf of unborn children. It was felt, however, that you should have the benefit of the consensus of the conference.

Gertrude Gates
Chief

ADDENDUM G

OFFICE OF THE BOARD

May 21, 1941

TO: Miss Hoey
Mr. Corson
Mr. Falk
Mr. Stern
Mr. Tate
Mr. Widhart
Miss Engle
Miss Beaman
Miss Wasserman

FROM: Maurine Mulliner

At the meeting of the Board on May 20, 1941, the following action occurred:

"The Board considered the memorandum from Miss Hoey dated May 10, 1941, 'Extension of Aid to Dependent Children in Behalf of Unborn Children' (Document No. 177-b) recommending that Federal participation be extended on behalf of unborn children to those States which include provisions for unborn children within the scope of the aid to Dependent Children program. Following considerable discussion the Board deferred a decision on this proposed interpretation of Section 406(a) until the next meeting when all Members of the Board are present."

Maurine Mulliner

ADDENDUM H

I V B 7 c Definition of dependent child
x V A 1 a (3)(a) Use of Federal funds
x V E 2 Audit policies
16:PA
May 21, 1941

Mr. Robert Bingham,
Assistant General Counsel,
Office of the General Counsel

A. D. Smith

Aid to Dependent Children - Extension to Include Children en Ventre sa Mere

Jack Tate asked me to acquaint you with the background of the discussion of the Bureau and the Board relative to the recognition of children en ventre sa mere. The propriety of matching payments to this group has been under advisement of the Bureau of Public Assistance practically ever since the beginning of the program. Progressive elements in the States have suggested it and there is some law or practice in the States which encompasses this group.

Personally you will no doubt not need to read the rather lengthy memorandum which I personally wrote on the issue sometime ago. . . .

* * *

Of course the argument for the recognition of the child is considerably strengthened by the fact that what we are doing is once here simply to define the word "child." I see no reason in the world why a child en ventre sa mere, diagnostically existent and subject only to the hazard of birth, is not a child. As far as its support is concerned the urge is overwhelming. It is the major period in the life of the child when help will be effective and when all further help will be made more effective. As applied to public assistance the fact that one or more children already exist in the family and that the mother is also with child makes it seem almost foolish not to permit the additional $12 to be added in behalf of the new conception. . . .

* * *

A. D. Smith

ADDENDUM I

C O P Y

16:SR

Ruth O. Blakeslee, Chief,
Standards and Procedures Division

March 23, 1939

Office of the General Counsel,
A. D. Smith, Prin. Atty.

The right of a child en ventre sa mere to receive aid to dependent children.

I have given some thought to the position of the Social Security administration in relation to unborn children, following the comprehensive survey of the law contained in Mr. Johnston's research memorandum of February 7, 1939.

The Pennsylvania law provides as follows:

"A mother shall be entitled to assistance under this Act for an unborn child, in like manner as for other children, if she has one or more children living which entitle her to the benefits of this Act." (P.L. 893, Section 9, as amended by P.L. 118, Laws of 1939, Section 5.)

Of course the limiting condition with respect to other children is a pure statutory limitation in Pennsylvania. It seems obviously allied historically to the mothers' aid theory which would treat the pregnancy merely as an additional cause of need of an eligible mother, whereas the aid to dependent children category has developed reciprocally to social legislation for the protection of children and its focus is upon the needs of the respective child. Under aid to dependent children theory eligibility is separately determined in relation to the existence of any child. The mother does not gain a general eligibility to aid by reason of the existence of a child, but the child derives a call upon the State operating through the guardianship of the mother.

My rationalization of this matter is as follows: There is fairly uniform authority which states in so many words that a child en ventre sa mere is to be regarded as a person in being insofar as it is necessary to insure the receipt by the child of benefits which accrue to the child itself. In other words while only those children whose birth antedates the controlling event can act as conduits of title from which others derive rights, the existence of unborn children is judicially recognized insofar as their own rights and benefits require it.

Now it is perfectly true that the principle was most often applied in property law where it is conditioned upon the subsequent birth of the child -- quite naturally so since the inheritance benefits for which

his existence is recognized are only operative for the child's own benefit. If the child is not subsequently born, the recognition of its existence for inheritance purposes could in the nature of things have significance only to others than the child. Acting as a conduit of rights and benefits to be enjoyed only by others is not a sufficient benefit to the child, when you are thinking in terms of property ownership.

In the same way ordinary civil rights naturally depend upon birth as they become only pertinent in respect of existence after birth. Analogous principles are applied in other types of cases cited in our case memorandum where recognition is made to depend on whether the child is quick or capable of separate existence if prematurely born. In other words recognition is accorded on a condition pertinent to the insurance of individual benefit from the recognition.

A wealth of extra-judicial authority can be cited in support of the fact that a child's development is basically conditioned upon adequacy of prenatal care. Unless the State can act in relation to such care its ministrations in behalf of the child subsequently are often basically prejudiced. Lack of sustenance prejudices constitutional development. Even the courts have acknowledged the truth of this extra-judicial authority as in the case of Metzger v. People, 93 Col. 133, 53 Pac. (2d) 1189. This case is obviously in point because it presents an action for non-support of an unborn child by its father under a statute giving the juvenile court jurisdiction in such cases. The court said in part:

> "It is no longer doubted that the months of prenatal existence are tremendously important ones from the standpoint of human welfare. * * *"

The court goes on to indicate the importance of prenatal care and adds that the failure of the father against whom the proceeding is brought to maintain the appropriate support

> "jeopardizes the health and safety of the offspring as a future citizen of the community."

I cite this case of course not as an authority upon any question of construction since the statute applied from conception. I cite it to indicate legal recognition of the validity of principles which assert the necessity for the State's intervention at an earlier period than actual birth, and which become important to the construction of our own definition.

Here in our situation we have State aid authorized for the specific purposes of the child's own development so that insofar as it is necessary to reach the child earlier than its actual birth the previous occurrence of birth is no test of benefit.

This can be phrased even more cogently. The occurrence of birth does not furnish a relevant point of departure. It has no more significance to us than the successful passing of any other crises in the child's

development. We are blinded by our tremendous regard for birth because of its significance in other respects. The number who in the past have died in the course of birth is the greatest cause of our attitude. The really basic condition of life is conception. The State necessarily acts through the mother or actual caretaker of the child anyway.

The facts which make recognition of prenatal existence essential in our case become pertinent prior to birth, not merely after birth, and earlier conditions of recognition are essential to insure the child's own benefit in cases where assistance is actually necessary. I concede, of course, that my determination is premised on the fairly uniform effect of extra-judicial authority.

It is always proper to construe any such statutory provision so as to achieve the law's purpose and make the legal provision effective. Insofar as the provision may be made ineffective because of the delay in recognition, the administrator should be called upon to preserve the effective operation of the law by intervening at the earliest stage necessary to achieve the purposes of the law. Hence I submit that any aid given prior to birth should be conceived of as incidental to the purpose and principle authorization of the law, and authority should therefore be conceded even by those who consider that the law affects born children primarily. Why, it may be asked, must we start with a child whose constitution is forever undermined by the fact that its mother's strength, on which it's own life depends, is diverted to other tasks? A great deal of authority on statutory construction could be cited for this purpose.

* * *

After all we are merely construing the word "child." The case of Foster v. State, 182 Wis. 298, 196 N.W. 233, is therefore pertinent in differentiating the embryo from a quick "child." Coke differentiated pregnancy from a "quick child" and this is carried over into criminal statutes.

Other analogies may be found in the possible construction of the words "parent", "father", "mother", and "child" to include a foster parent, as indicated in the Harvard Law Review, 52 H.L.R. 515. It is not at all uncommon for the law to construe words of relationship to include relationships created by law rather than to confine them to their natural relationship, when the legal incidents are the same in either instance. In Faber v. Industrial Commission, 352 Ill. 115; 185 N.E. 255, a woman in loco parentis to the employee was held to be a parent. The Workmen's Compensation cases are obviously pertinent here. They recognize a child unborn at the time of the controlling event or accident as a dependent. The fact that a child has to be born under a certain compensation case to receive the actual benefits is not a relevant condition in our case since our statute is founded upon aid through the mother. The theory is different. The care and maintenance of the child is the object of the statute not the independent right to moneys in compensation for parental injury. The right of the child to assistance is a mere right to expenditure for its benefit.

The legal constructions of words of relationship, however, go beyond what we are talking about since we are dealing with the ante-human being but merely at an earlier point of its development. All we are saying is that a child is a child prior to delivery, as all the world knows, and we are doing it merely for the purpose of safeguarding the State's expenditure of money at a later period.

There appears to be ample authority even in common parlance as the court said in the Poplar case for us to talk of a child in respect of one not yet delivered. There is no construction involved. It is the common accepted meaning of words. The more authentic the processes of birth become under modern protective measures, the less hesitancy there is in our reference to the child. It is freely conceded in case after case that the law has been hampered by its attempt to formulate principles prior to the scientific development of obstetrics. This has been a real influence in tort cases where the law fears imposition.

* * *

I do not think that residence requirements can be deemed to have any relevancy in this aspect of coverage. As in the case of civil rights, the child has no separate residence prior to birth and only gradually acquires separate residence conditions thereafter. Prior to birth it is natural to think of the residence qualifications only in terms of the mother. The relationship also conditions residence after birth. You construe the residence requirements in the light of what the legislature imposes in the case of both mother and child. You cannot carry over the conditions imposed so as to affect your definition of the concepts of mother and child.

I think, therefore, we are fully justified in matching payments actually made by a State for the benefit of a child some months prior to its birth where it is shown that those payments are necessary to insure the adequate start and opportunity of the child and thus to utilize the subsequent aid more effectively and without the irreparable prejudice to its own life caused by diversion of maternal energies.

Judicial recognition in many instances hinges on the condition that the child be quick or capable of a separate existence. As I see it the latter condition has no relevancy. The condition of quickness, however, has often been deemed essential to the legal concept of life since the time of Blackstone. The concept of quickness may therefore have some significance. I do not think, however, that this condition has to be at all rigidly applied. I think it might serve as a general guide. As soon as there is no question of abortion, we may take the position that the preservation of the life may depend upon the ability of the mother to refrain from work. Help given from this time is therefore definitely a service to the child.

I think that this should be our guide and that the institution of such procedure should depend upon conditions of accurate diagnosis and apart from that should be governed by the indicated requisites of the case.

It seems to me that any other rule would in many cases render the State helpless. It would mean that the State could act only on a contingency, the contingency of birth, which has no rational bearing in our case although it may have in the definition of a particular crime such as a murder or with respect to the inheritance of property. The moment you repudiate those considerations of legal interpretation which are pertinent only to the resolution of specific issues for which the question of prenatal recognition is being determined, you are left to face the apparent fact that the law is premised upon the more basic underlying principle that every child has a prenatal existence whatever the particular condition it may in any case attach to its recognition. Each condition of that recognition has been devised to meet a particular situation to which it is pertinent. I cannot therefore see how any criticism could attach to the interpretations of the Social Security Act in the light of that general recognition and in such a way as to permit the fulfillment of its purpose.

I would therefore advocate immediate consideration of this from a policy standpoint, including the laying down of conditions for the inclusion of such assistance with an urge to the States to provide such relief in all cases of unquestionable diagnosis and according to the needs of the particular case.

If this is decided upon, this office could then prepare a memorandum of argument and authority for the use of the States and their legal advisers. For this purpose we suggest that we be accorded references to any extra-judicial authority of real merit upon the question as to the importance of prenatal relief in relation to the constitutional development of the child, and perhaps as an aid in the safeguarding of normal birth and maternal functioning.

A. D. Smith

ADDENDUM J

IV B 7 c (1) Definition of dependent c[hildren]
x V A 1 a (3)(a) Use of Federal Funds
x II A 1 c U.S. Childrens Bureau: Co[opera-]tive Relationship with Audit Policies

15:SP

August 23, 1941

Regional Director, Chicago
Attention: Miss Martha E. Phillips,
Public Assistance Representative

Peter Kasius, Acting Director,
Bureau of Public Assistance

Wisconsin--Extension of Aid to Dependent Children in Behalf of Unborn Children--Attaching Statement Prepared by Standards and Procedures - referring to RFL 331, dated August 9, 1941

On July 15, 1941, the Board considered the question raised by Wisconsin as to whether title IV could be interpreted to permit extension of the aid to dependent children program to include provision for unborn children within the scope of the State's approved plan. For your information we are attaching the statement of Bureau recommendation on this question and the memorandum sent to other regional representatives by the Division of Standards and Procedures. An item covering the audit aspect of the Board's decision on the matter was included in the Regional and Field Letter dated August 9, 1941.

The Board approved the Bureau's recommendation that Federal participation may be extended on behalf of unborn children to those States which include provisions for unborn children within the scope of the aid to dependent children program. It was decided, however, that no formal policy would be enunciated, but that the decision with reference to Wisconsin might constitute a precedent that could be followed if other States wish to extend the scope of their aid to dependent children program by similar interpretation.

You are, therefore, advised to communicate the Board's decision to Wisconsin. . . .

* * *

As you have indicated in earlier memoranda on the subject, it will be necessary for the Wisconsin agency to [illegible] supplementary plan material to its aid to dependent children to include children now covered by section 48.311 of the Wisconsin statutes. In this connection, we suggest that you point out to the State

agency the necessity that the State plan material on this extension of the aid to dependent children program make it clear that the requirements and standards applicable to aid to dependent children are equally applicable to this group, particularly the requirement regarding cash payments and the requirement that the State plan be State-wide in operation and effective in all political subdivisions. We recognize that the State may wish to supply special benefits to this group in the form of medical care, etc. over and above the aid to dependent children payments on which Federal matching is requested, and there is no objection raised to such a practice.

Peter Kasius

ADDENDUM K

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
Welfare Administration
Bureau of Family Services

February 4, 1965

POLICY INFORMATION RELEASE NO. 37

In reply refer to:
15:D

TO ALL PUBLIC STAFF FOR INFORMATION ONLY

SUBJECT: Inclusion of Unborn Child in AFDC Payments (List under Eligibility, Determination of and Aid to Families of Dependent Children; File under IV-A)

A State plan provision providing for assistance to an unborn child only if the mother is already a recipient of AFDC for one or more other children cannot be accepted. Such a plan provision is not in compliance with the requirements of Title IV of the Social Security Act.

A State may include unborn children under its approved AFDC plan and receive Federal financial participation in payments to meet their need, if such children meet the definition of "dependent child" in section 406 (a) of the Act. This is consistent with the objectives of the Act. However, the conditions under which coverage of the program is extended to unborn children must be established on the basis of principles that assure equitable and uniform treatment of all individuals in like circumstances of need in order for the State to continue to qualify for Federal grants for its AFDC program. To include only the unborn child whose mother is already receiving AFDC does not meet these principles. The question arises from the fact that coverage is extended only to the unborn child of a mother who is a recipient because she has at least one other child who qualifies for AFDC. It excludes the unborn child of a pregnant woman who does not have a child eligible for AFDC but is in similar circumstances as to need and parental deprivation.

Such a State plan proposal discriminates arbitrarily and capriciously against such a child and, therefore constitutes a classification that is unrelated to need and is unreasonable in terms of the objectives and principles governing administration of the AFDC program.

ADDENDUM L

REGULATIONS

Handbook of Public Assistance Administration Part IV (1946), (Eligibility and Payments to Individuals):

3400. Several factors combine to make up the definition of "dependent child" as used in title IV of the Social Security Act. These eligibility provisions have been interpreted individually, but each interpretation is related to a definite concept of the objectives of aid to dependent children. The interpretations are intended to define and clarify the area of operation in which the Federal Government can participate financially under the act. This has been done (1) to free States from some of the uncertainties that have been partly responsible for restrictions limiting coverage, and (2) to support States in improved practice that accomplishes the objectives of the program.

The specific eligibility factors in aid to dependent children are interpreted in the light of two proper objectives: (1) indication of the scope of coverage in Federal-State aid to dependent children programs consistent with the provisions of the Social Security Act; (2) the provision and continuity of service. The interpretations recognize that during periods of special stress or difficulty for children, continuity of service may be of particular importance. Federal participation in the program may be continued for temporary periods while necessary adjustments and readjustments are being worked out in specified situations.

These interpretations, while making possible an increased scope for the development of State policy and practice within the legal framework of the Federal act, are not intended to limit the States in providing programs that extend beyond the bounds of Federal financial participation.

* * *

3410. Deprivation of Parental Support or Care

3411. Provision of the Act

Title IV, section 406 (a) reads:

> "The term 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ."

3412. Interpretation

This provision sets forth the two eligibility factors, "need" and "deprivation of parental support or care," on which Federal participation is conditioned. The provision requires that both need and deprivation of parental support or care exist in the individual case but does not require that an affirmative showing be made that a causal relationship exists in the individual case.

Under the act, the term "deprived of parental support or care" is interpreted to encompass the situation of any child who is in need and otherwise eligible, and whose parent either has died, has a physical or mental incapacity, or is prevented by continued absence from providing maintenance, physical care, and guidance for his children. In this interpretation "parent" may mean either the father or the mother. Since the interpretation relates to parental support or care, it is equally applicable whether the parent was the chief breadwinner or devoted himself or herself primarily to the care of the child.

Situations within the scope of the term "deprivation" are as follows:

* * *

6. Unborn Children

When the mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to other children.

* * *

L3

Iowa State Dept. of Social Services Employees' Manual XII-1-10a, 10b:

MEDICAL ASSISTANCE

GENERAL

GROUPS COVERED BY MEDICAL ASSISTANCE

1. Recipients of aid to dependent children including children under age 21 in such families who are ineligible because of age

* * *

2. Individuals and families whose assistance grants were cancelled effective October 1, 1972, as a result of the 20% increase in Social Security benefits which became effective on that date.

* * *

3. Persons Receiving a Monthly Payment under the Supplemental Security Income Program for the Aged, Blind and Disabled (SSI)

* * *

4. Persons Receiving Care in a Medical Institution (hospital, skilled nursing facility or intermediate care facility) who meet all eligibility requirements for SSI except for income and whose income does not exceed the cost of care in the facility based on the Department's standards or 300% of the basic SSI payment whichever is the lesser amount. (See XII-1-Part Two)

5. Children under age 21 in foster care for whom the Department has assumed financial responsibility either in whole or in part including children in subsidized adoptive placements. (See Employees' Manual, VIII-6, FOSTER CARE SERVICES)

Iowa State Dept. of Social Services Employees' Manual XXII-1-14:

MEDICAL ASSISTANCE (cont'd)

AMOUNT, DURATION AND SCOPE OF MEDICAL AND HEALTH SERVICES (cont'd)

* * *

1. Physicians (Doctors of Medicine and Osteopathy)

* * *

Scope of Service - Payment will be approved for all services and supplies provided by the physician including services rendered in the physician's office or clinic, the home, in a hospital, nursing home, or elsewhere.

* * *

Certificate of Service

I, Robert Bartels, hereby certify that on the 16th day of December, 1974, I mailed one (1) manuscript copy of the BRIEF FOR RESPONDENTS, correct postage prepaid, to:

Lorna Lawhead Williams
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Attorney for Petitioners

I further certify that all parties required to be served have been served.

Robert Bartels

ROBERT BARTELS
College of Law
University of Iowa
Iowa City, Iowa 52242
Attorney for Respondents